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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner,*

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner,*

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jewell Ridge Coal Corporation, appellee in the Circuit Court of Appeals for the Fourth Circuit, hereby prays that a writ of certiorari issue to review a judgment of that Court, entered on the 6th day of October, 1944, with accompanying opinion by Judge Parker concurred in by Judge Dobie and dissenting opinion by Judge Soper, reversing a judgment of the District Court of the United

States for the Western District of Virginia entered on the 25th day of January, 1944.

Petitioner annexes hereto a brief in support of this petition, and adds for convenient reference, as an appendix, copies of the opinions of the Circuit Court of Appeals and of the District Court below, as well as the opinions of this Court and of the Circuit Court of Appeals for the Fifth Circuit and of the District Court in the case of *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, etc.*

All italics are petitioner's unless otherwise noted.

For brevity, the Fair Labor Standards Act of 1938, 52 Statutes at Large 1060-9, 29 U. S. C. A. 201-219, will be called the Act; the Administrator of the Wage and Hour Division of the United States Department of Labor will be called the Administrator; International Union, United Mine Workers of America will be called the Union; and the case of *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123, etc.*, will be called the Muscoda Case.

A. JURISDICTION.

The jurisdiction of this Court is based on section 240 (a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the Act of February 13, 1925.

B. STATEMENT OF THE MATTER INVOLVED.

I. The Pleadings and the Proceedings in the Case.

This is an action under the Federal Declaratory Judgment Act, section 274 (d) of the Judicial Code, 28 U. S. C. A. 400, as amended, instituted July 30, 1943, by petitioner against its underground workers as a class and the International Union, United Mine Workers of America, their representative in collective bargaining, to obtain judicial construction of the Act for the purpose of determining whether the word "workweek" as used in section 7 of the Act includes, by force of law, the time spent by the employees in traveling underground to and from their usual working places in petitioner's mines.

Because of the importance of the question to this major national industry, this case has received considerable publicity under the designation of the "Portal to Portal Case." It was previously before this Court, during the October Term, 1943, upon petition of respondents herein for a writ of certiorari before the Circuit Court of Appeals for the Fourth Circuit had heard the case. This Court denied that petition by order entered on May 29, 1944.

Petitioner is engaged in the business of operating two mines, employing about nine hundred men in all, in the bituminous coal mining industry.

The complaint alleged, and the proof established, that at petitioner's No. 1 mine the average underground travel time per underground employee was 88 minutes per working day, and at No. 2 mine 67.1 minutes, involving a total of 765 underground employees, for none of which travel time had payment ever been demanded or made. This indicates a formidable potential liability under the Act, and if projected to the entire bituminous coal mining industry, would make a sum of vast amount. The vital importance of the case on that score both to petitioner and to the industry is obvious without elaboration. The question presented is of equally great importance to petitioner, and to the industry, upon the score of maintenance of future competitive position, as will be pointed out hereinafter.

Petitioner in its complaint asked the Court to declare among other things that:

> "(a) Plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at the usual working places, exclusive of the lunch period and travel time, as provided in the effective wage agreements, and in paying its underground workers for their services on that basis, had complied with and discharged the obligations imposed upon it by Section 7 of the Fair Labor Standards Act."
>
> "(b) Section 7 of the Act does not require that there be included within the workweek of underground workers in plaintiff's mines time spent in travel from the portal to their usual working places and return."

The defendants by joint answer asserted that petitioner's underground employees had been employed for workweeks longer than those prescribed in section 7 of the Act and had not been paid for all of their working time as required by the Act. They filed a counterclaim in behalf of themselves and all other employees similarly situated claiming for the entire period subsequent to the effective date of the Act (October 24, 1938) the overtime compensation, liquidated damages and attorney's fee provided by the Act. Before the trial began, defendants filed an amendment to their counterclaim disclaiming the compensation and liquidated damages applicable to the period preceding April 1, 1943.

On January 25, 1944, the District Court entered judgment declaring:

> "1. That the Fair Labor Standards Act of 1938 does not require that there be included within the workweek of underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return; and
>
> "2. That plaintiff, in computing the workweek of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals, and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938" (R. p. 578).

The carefully considered opinion of the District Court appears in the record, pp. 543-576, is reported in 53 F. Supp. 935, and appears in the appendix to this petition (pp. 43-79).

From the judgment of the District Court respondents appealed to the Circuit Court of Appeals for the Fourth Circuit, which on the 6th day of October, 1944, by a divided Court, reversed the case (App. pp. 80-92).

II. Summary Statement of the Facts.

The following are the chief pertinent facts shown in evidence and found by the District Court:

1. Petitioner's mines had always been operated on the "face to face" basis of measuring working time, i.e., working time was measured by the hours worked by the particular employee at his usual working place exclusive of travel time (App. p. 49).

2. The face to face basis was traditional in the bituminous coal mining industry, and had been used in all the successive wage agreements negotiated by the employers in the industry over a period of at least fifty years through collective bargaining with the employees represented by the Union, a "strong and powerful" labor organization (App. p. 50, 70).

3. The face to face basis was written into the Code of Fair Competition made in 1933 for the bituminous coal mining industry in conference with the representatives of the Union and of the employers, and approved by the President of the United States, pursuant to the provisions of the National Industrial Recovery Act (App. p. 50).

4. The face to face basis had been consistently followed throughout the industry down to the date of institution of this action (App. p. 50).

5. The legislative history of the Act as contained in the evidence taken by the committees, the committee reports and the debates, shows, as found by the District Court below, that it was not the intention of Congress nor the expectation of the industry that the Act should "interfere in any way with the wage structure of the bituminous coal mining industry" (App. p. 60-1), but just the contrary, and that it was not the desire of either the Union or the employers that it should so interfere.

6. Upon passage of the Act neither employers nor the Union saw in it anything requiring a departure from the face to face basis, and both continued, after the Act became effective, to make wage agreements on that basis just as before (App. p. 50).

7. The question whether travel time is required by the Act to be included in the workweek was first raised in pursuance of a routine inspection of a Pennsylvania company made by field representatives of the Administrator. The question was exhaustively examined and considered by the Administrator and his field and legal staff over a period of several months. Representatives of employers and of the Union from time to time urged upon the Administrator the importance to the industry of leaving the face to face basis undisturbed, and finally joined in a strongly phrased written representation under date of July 9, 1940 ("the Houck Letter") to that end (App. p. 75-9). The Administrator upon the basis of his thorough investigation and consideration of the question *issued an administrative ruling that under the facts of the history and conditions of this particular industry, which he found to present "a unique situation"* (R. p. 694), *the face to face basis was allowable.*

8. The economy of the industry, its wage structure, its freight rates, the ability of its units to survive under competitive conditions, are all inseparably joined with the face to face basis, and a departure therefrom would under conditions of normal competition have disastrous consequences, so much so as

> "* * * to result in complete chaos * * * and the very purpose of the Fair Labor Standards Act would be defeated * * *. This would be a most unhappy result to flow from an Act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and high rates of pay in the bituminous coal mines" (joint written statement of Union and operators to Administrator, July 9, 1940, App. p. 52).

9. The Union's supposed demand in March, 1943, for a shift to the portal to portal basis, i. e., payment for all the time employees spend after entering the portal of the mine until they emerge therefrom less only the lunch period, was, as found by the District Court below, "actually a demand for a flat wage increase to all mine workers, whether or not they spent any time traveling underground" (App. p. 54-5), and was advanced solely in an effort to evade the obstacles to the desired wage increase presented by the National Wage Stabilization Program. The demand did not include any request for payment for travel time as such.

10. Underground travel in petitioner's mines, as found by the District Court below, presents "no such painful and burdensome conditions as those described in the iron ore mines" (App. p. 71), thus indicating that in the bituminous coal mining industry a powerful union and genuine collective bargaining had succeeded in effecting improved conditions incidental to underground travel, as well as to other conditions of employment. The District Court below found as a fact that underground travel time in petitioner's mines was not worktime within the requirements of the Act.

11. If petitioner were now held liable for back pay and overtime and statutory damages on account of past failure to include travel time in the workweek, the result, even after applying the Virginia 3-year statute of limitations, would produce a "great amount of money" (Houck letter, App. p. 78), estimated at a million dollars, as potential liability. If this sum with respect to petitioner, a comparatively small unit in a major national industry, is projected to the industry as a whole, the ruinous possibilities are at once apparent, as pointed out in the minority opinion of the Circuit Court of Appeals (App. p. 92). Even if it be assumed that the voluntary disclaimer of all amounts applicable to the period prior to April 1, 1943, made by respondents in their amended counterclaim (thus reducing the period of potential liability to that from April 1, 1943, to

November 3, 1943—date of Ickes-Lewis Agreement, which adopted the portal to portal plan of computing working time) is enforceable against petitioner's employees, there would still remain a potential claim against petitioner estimated at three hundred thousand dollars, with a correspondingly large projection as to the industry as a whole.

12. The fact that the industry has been operating upon the portal to portal basis since the Ickes-Lewis Agreement became effective on November 3, 1943 (R. p. 793-5), under war-time absence of competitive conditions, does not, as the majority opinion of the Circuit Court of Appeals seems to assume (App. p. 86), provide any insurance against the calamitous effect of portal to portal when competitive conditions return after the war. The contrary is established by the uncontradicted testimony in this case—

> "* * * the industry and the United Mine Workers will, after competitive conditions return, have to back away from this portal to portal thing in order to insure the maintenance of competition between operators and to insure maintenance of work for their own people" (R. p. 145).

III. The Decision of the Circuit Court of Appeals.

In the majority opinion of the Circuit Court of Appeals it is said:

> *"In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the 'face to face' basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the Act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking,* as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the Act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and

> ably set forth in the opinion of the learned judge below and need not be repeated. *They would be convincing,* were it not for the decision of the Supreme Court in *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123 etc.* .... U. S. ...., 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar" (App. p. 81).

This necessarily means that the court was of opinion to sustain the Administrator and the District Court and affirm the case, and would have done so but for certain general language (App. p. 141-2) *contained in the opinion of this Court in the Muscoda decision.* That language the Court deemed to be as applicable to the bituminous coal mining industry as to the iron mining industry. Yet this Court, in deciding the Muscoda Case, did not have before it the facts of the history and conditions of petitioner's mines or of the coal mining industry. *The situation therefore is that petitioner was not accorded a judicial review of its own case by the Circuit Court of Appeals, but that court determined petitioner's rights solely by reference to a different case dealing with a different industry and involving a different state of facts. The findings of fact of both the Courts below are wholly in petitioner's favor.*

The Circuit Court of Appeals concludes:

> "Under the circumstances, there is nothing for us to do but reverse the decision below. If it is thought that the decision of the Supreme Court should be overruled or limited so as not to apply to a case of this character, that is a matter for the Supreme Court and not for us" (App. p. 86).

A fair interpretation of the above language is that the Court did not consider itself free to attempt to distinguish the case before it from the Muscoda decision. Instead, it suggested, even invited, the appellee before it to take the case to this Court and ask it to declare the distinction, if one exists. Petitioner feels that the Circuit Court of Appeals took too narrow a view of its powers and proper

functions. In this connection some weight should be given to the previous denial by this Court of certiorari upon petition of the Union. In effect that action, which was subsequent to the decision by this Court in the Muscoda Case, is a refutation of the conclusion that the Muscoda Case foreclosed the Circuit Court of Appeals from attempting to draw a distinction. Since the Circuit Court of Appeals did not choose to act in the premises, but instead passed the question back to this Court, petitioner looks with assurance to the granting of its application for a hearing.

C. THE QUESTIONS PRESENTED.

1. Did this Court in the Muscoda Case intend to decide the instant case by foreclosing consideration thereof on the merits?

2. With regard to the ruling of the Administrator that there are such differences between the iron mining industry and the bituminous coal mining industry that while the portal to portal basis is properly applicable to the former, face to face may be applied to the latter, did the Circuit Court of Appeals correctly deem the Administrator's ruling to be invalidated by the Muscoda decision in spite of the fact that this Court did not have before it in the Muscoda Case the facts of history and conditions of the bituminous coal mining industry upon which the Administrator's ruling was made?

3. In view of the fact that the Circuit Court of Appeals found that the District Court's findings and decision in the case at bar "*would be convincing were it not for the* (*Muscoda*) *decision* * * *" and would thus have affirmed the case *but for that decision alone*, did the Circuit Court of Appeals correctly hold that it was compelled by that decision to reverse the case despite the fact that this Court in the Muscoda Case did not have before it the facts of the history and conditions of the bituminous coal mining industry and of petitioner's mines, upon which the District Court's decision was based?

4. Was the District Court at liberty to form its own judgment on the facts in this case without giving controlling effect to the findings of the District Court in the Muscoda Case?

5. Did the District Court err in finding essential distinctions between what was shown in the case at bar and what was found in the Muscoda Case as to allowability of the face to face basis in respect to (a) long established custom and practice universally followed in the industry, (b) long succession of uncoerced collective bargaining agreements made both before and after passage of the Act, (c) the respective rulings of the Administrator, (d) the testimony before the committees of Congress specifically relating to the bituminous coal mining industry and the joint committee report, as well as the congressional debates upon the Act, and (e) the conditions and circumstances attending the respective underground travel?

6. Did the District Court err in finding as a fact that underground travel time in petitioner's mines was not "work" time within the requirements of the Act?

7. Did petitioner, by paying its underground workers on the face to face basis in accordance with its collective bargaining agreements, discharge its legal liability to them, or does the Act by its very terms impose an additional liability?

8. Does the Act conclusively impose upon underground travel in petitioner's mines the character and status of "work" so as to withdraw such travel from the field of collective bargaining and compel the parties to treat it as "work" under the Act, irrespectvie of all the facts of history and conditions proved in the case at bar?

9. Has the term "workweek" as used in the Act such a meaning by force of law as to displace the definition of that term traditionally and universally accepted by everybody in the bituminous coal mining industry, and strongly contended for by the Union up to 1943?

D. REASONS FOR GRANTING THE WRIT.

As its reasons for granting the writ herein prayed for, petitioner respectfully assigns the following:

1. The Circuit Court of Appeals has decided in this case an important question of federal law which has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals in this case has given improper effect to a decision of this Court, to-wit, the Muscoda Case.

3. The Circuit Court of Appeals took the decision of this Court in the Muscoda Case, which was based upon the facts, conditions and history of the iron ore mining industry, as declaring the law for the bituminous coal mining industry as well, notwithstanding the distinguishing facts as found by the Administrator and by the District Court, and by the Circuit Court of Appeals itself.

4. Evidence of facts and conditions in the bituminous coal mining industry was excluded from the record in the Muscoda Case, yet the decision in that case was taken by the Circuit Court of Appeals as conclusively controlling the present case without regard to the distinguishing facts as found by the Administrator and by the District Court.

5. The Circuit Court of Appeals construed the decision of this Court in the Muscoda Case as writing into the Act such a definition of the term "workweek" as would necessarily apply to all underground travel in all other mining industries, regardless (a) of the particular industry, (b) of the custom and practice thereof, (c) of a contrary definition of that term established through many years of collective bargaining, (d) of a contrary conclusion of the Administrator, and (e) of the conditions and circumstances attending the travel in petitioner's mines.

6. The Circuit Court of Appeals held that, *solely by reason of the decision of this Court in the Muscoda Case*, underground travel in petitioner's mines was, as a matter of law, "work" within the purview of the Act, notwithstanding that such travel time had been at all times pre-

viously excluded from the workweek by (a) long continued custom and practice universally followed in the industry, (b) common consent of employer and of the employees acting voluntarily through a powerful union and expressed in collective bargaining agreements made both before and after passage of the Act, (c) the N. R. A. Code officially adopted for the bituminous coal mining industry and approved by the President of the United States, (d) the testimony before the committees of Congress and the debates therein upon the Act, (e) the ruling of the Administrator, and (f) the judicial findings of fact sustained by "convincing" reasons supporting the District Court's decision.

7. The Circuit Court of Appeals, considering itself constrained by the decision of this Court in the Muscoda Case, in effect referred this case to this Court for consideration of and decision upon the distinguishing elements of the two cases—"that is a matter for the Supreme Court and not for us" (App. p. 86).

8. The facts in this case, from the standpoint both of employees and employers, are representative in a major industry of the United States and merit examination by this Court before there is a final judgment construing the Act as to one of its provisions peculiarly important to that industry.

9. Factual grounds of controlling importance, found in the Muscoda Case and assigned by this Court in support of its decision, were not only not found to exist in the case at bar, but the very opposite were found.

10. The amount immediately involved in this case is large, and, as concerns petitioner, overwhelming, while the amount collaterally involved as concerns the bituminous coal mining industry as a whole is so large as to threaten insolvency to the entire industry.

11. The issue involved is of vital importance on another score: the coal industry is highly competitive both internally and *quoad* other fuels; labor costs account for about two-thirds the total production cost; travel time is

an inescapable variable in production cost; and the whole system of competitive relations between districts and individual mines has been built up on the "face-to-face" system in which wages were geared directly to work at the usual working place. No competitive conditions have existed in the industry since November 3, 1943, when the "portal-to-portal" basis was adopted. The disturbances and dislocations inevitably to be encountered upon the return of competition are serious in the extreme. For this reason it is of the utmost importance that the employers and employees in the industry should then be free to bargain collectively about so significant a factor and to deal with it in such way as the best interest of the industry may dictate. If the decision of the Circuit Court of Appeals stands, the door is locked against the future adoption by voluntary agreement of any alternative to the portal to portal basis.

E. PRAYER.

The premises considered, your petitioner respectfully prays that the writ of certiorari may issue as hereinbefore set out.

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BRIEF FOR PETITION IN SUPPORT OF PETITION FOR CERTIORARI.

PROPOSITION I.

This is Such a Case as Would Ordinarily Impel This Court to Grant Certiorari.

This is a case of great importance to petitioner and to the bituminous coal mining industry in general. Great sums of money are directly and indirectly involved. The manner in which an important federal statute is to be applied to a major national industry is directly in issue. Drastic effects both upon the economy of petitioner and

of the industry in general and upon their future manner of operation hinge on the decision. Neither the facts nor the issue, as to this industry, has ever been before this Court, so that this Court has never spoken thereon. In short, this is just such a case as should reasonably embolden the litigant in ordinary course to anticipate with some confidence that certiorari would be granted.

PROPOSITION II.

The Circuit Court of Appeals Below Erred in Holding That This Court in the Muscoda Case Decided the Same Issue as That Here Presented.

The only apparent argument against certiorari is that this Court in the Muscoda Case decided also the case at bar. The Circuit Court of Appeals below so held and *solely upon that theory* reversed the District Court. If that theory is plainly correct, then certiorari would be pointless.

But there are weighty reasons against that theory, reasons which, as it seems to us, the Circuit Court of Appeals failed to appreciate.

1. This Court in the Muscoda Case did not have before it the facts of the bituminous coal mining industry, but only of the iron mining industry. It specifically excluded and disregarded the testimony which was offered with reference to the bituminous coal mining industry.

The District Court in the instant case pointed out that the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case "strictly confine their holding to the *particular circumstances of that instant case.*" He quotes the following:

> "We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time or as upholding the portal to portal theory as a matter of law, or as denying the principle *that in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually*

affected. The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal. We have expounded no rigid definition of working time. The Act fails to provide one and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely: 'because the employment relationships to which the Act would apply were so various and unpredictable' (citing *Walling* v. *Belo Corporation,* 316 U. S. 624, 634) * * *

"Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We do not do either; *we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances.* (App. p. 65, 53 F. Supp. 935, 946, court's italics).

To the same effect is the following from the Circuit Court of Appeals in the Muscoda Case:

"Unless the facts are undisputed and only one reasonable inference may fairly be drawn therefrom, what is working time is always a question of fact for the court or jury. In view of the diverse legislation above cited, and the general diversity of opinion on the subject, it cannot successfully be argued in this case that only one fair and reasonable inference may be drawn from the facts and circumstances in evidence." (App. p. 127, 8, 137 F. 2d 176, 184)

Thus it is perfectly plain that the District Court and the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case confined their consideration and decision to the particular facts *as to the iron mining industry* which were before them—"the declaratory judgment is limited by the facts of the case" (App. p. 119, 137 F. 2d 176, 180).

This Court, in its decision, approved the exclusion of the facts as to the bituminous coal mining industry, saying

that the District Court "*properly directed its attention solely to the evidence concerning petitioner's iron ore mines and disregarded the customs and contracts in the coal mining industry*" (App. p. 140).

The employees in the Muscoda Case, represented by the same attorney who is senior counsel for the Union here, insisted in their brief that the Court should confine its consideration to the iron mining industry, wholly excluding the bituminous coal mining industry from any relation to the case. The District Court below quoted from that brief as follows:

> "We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in Jefferson County. *In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies.* In coal mining the men work seven hours per day. At no point in the voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day." (App. p. 70, 53 F. Supp. 935, 948, court's italics.)

The necessary conclusion is that this Court has not had before it any basis for a decision of the present issue in relation to the bituminous coal mining industry, and hence the Circuit Court of Appeals for the Fourth Circuit was in error in holding that this Court in the Muscoda decision decided also the corresponding issue in the case at bar.

With regard to the general language quoted by the Circuit Court of Appeals from this Court's opinion in the Muscoda Case (App. p. 84-5) as sustaining the holding that the Muscoda Case decided the present issue, the importance of confining the effect of judicial language to the

evoking factual setting has long been recognized. Chief Justice Marshall's remarks thereon in *Cohens* v. *Virginia*, 6 Wheat. 265, 399, 5 L. ed. 257, 290, are familiar:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

2. The issue as to what constitutes the work time of specific employees in a specific industry under the requirements of the Act is a question of fact. The decision of this issue with respect to the bituminous coal mining industry can be made only upon consideration of the facts presented by that industry.

Obviously, a consideration of the facts as to the one industry cannot safely be looked to as a basis for deciding the issue as to the other industry. This was fully recognized by the Circuit Court of Appeals in the Muscoda Case, as follows:

> "Whether one is working, resting, idling, playing or preparing to work is as much a matter of fact as whether one is asleep or awake or is laughing or crying . . . The working time of every miner is a definite controlling fact that can and must be finally determined in order to fix the amount of wages due him under the federal statute. *It is a fact that cannot be found in any statute or decision or law book . . . but must be determined by the Court or jury* in any justiciable controversy wherein a real issue arises with respect thereto" (App. p. 124-5, 137 F. 2d 176, 182).

The essential principle was stated by Mr. Justice Jackson in his concurring opinion in the Muscoda Case thus:

> "When Congress in the Fair Labor Standards Act referred to "a week longer than forty hours," it considered, I as e, that *what was a workweek in fact should be a workweek in law.* Therefore, the determination of any particular case does not govern any other, for each establishment and industry stands on its own conditions" (App. p. 144).

The only exception to this proposition which could arise would be when the essential facts of the two industries were identical with respect to underground travel. But that is not the case here.

The District Court below, sitting without a jury, found as a fact that travel time in petitioner's mines is not work time within the requirements of the Act. This is a finding of fact. It was so distinctly held by the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case—"What constitutes working time is a question of fact depending upon the particular circumstances" (App. p. 107, 135 F. 2d 320, 322); "as much a matter of fact as whether one is asleep or awake" (App. p. 124, 137 F. 2d 176, 182); "what is working time is always a question of fact for the court or jury" (App. p. 127, 137 F. 2d 176, 184).

The District Court's finding, under Rule 52 of the Federal Rules of Civil Procedure, "shall not be set aside unless clearly erroneous . . . " In the note of the Advisory Commission to this Rule it is said:

> "It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony" (U. S. C. A., tit. 28, sec. 723 (c), Rule 52).

Commenting upon the effect of Rule 52, the Circuit Court of Appeals for the Fifth Circuit in the Muscoda Case said:

> "Even where there is no dispute about the facts, if different reasonable inferences may fairly be drawn

from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. That this dispute turns upon questions of fact does not withdraw it from judicial cognizance in an action for a declaratory judgment. 'The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is every day practice.' The parties saw fit to submit the issues of fact to the court, without a jury, but this does not render indistinguishable the issues of law and fact. What constituted the workweek of these employees and how many hours they were suffered or permitted to work are questions of fact'" (citing Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 242) (App. p. 120, 137 F. 2d 176, 180-1).

The Circuit Court of Appeals held in the instant case that the District Court's reasons in support of his finding "*would be convincing*, were it not for the (Muscoda) decision . . . ", thus clearly concurring in the District Court's finding. It was said by Mr. Justice Jackson in his concurring opinion in the Muscoda Case App. p. 144):

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

In view of the weight to which the findings below in the instant case are thus entitled, is it not plain that there is such a showing of distinction between the facts of the two cases as to make it illogical to assume that this Court, in deciding the Muscoda Case, decided the instant case also? If it did not, then the propriety of granting certiorari is distinct.

The District Court below rendered his decision before this Court decided the Muscoda Case, but after the Muscoda decisions of the District Court and the Circuit Court of Appeals. Conceding the correctness of these, he yet found that the facts of the case at bar in the bituminous coal mining industry were so essentially different from the

facts of the Muscoda Case in the iron mining industry as to make the Muscoda decision inapplicable. He said:

> " . . . conceding the correctness of the decision of the majority in the Tennessee v. Muscoda Case, it seems to me that this decision is clearly distinguishable from the instant case and not in point here" (App., p. 68-9, 53 F. Supp. 935, 948).

He noted distinctions under the following heads (App. pp. 69-71, 53 F. Supp. 948-9):

(a) *The Respective Rulings of the Administrator.*—The Administrator ruled in the iron mining industry that the underground travel time must be included in the workweek, whereas in the bituminous coal mining industry his ruling was "precisely the converse" (App. p. 69, 53 F. Supp. 948). The District Court in the Muscoda Case leaned heavily upon the Administrator's ruling in the iron mining industry, saying:

> " . . . these conclusions are the same as those announced in the summary of the so-called modified portal to portal opinion of the Administrator of the Wage and Hour Division . . . " (App. p. 103-4, 40 F. Supp. 4, 10).

The District Court in the instant case correspondingly leaned heavily upon the Administrator's ruling in the bituminous coal mining industry, saying:

> "The fact that the precise question here presented has been investigated and ruled upon by the governmental administrative agency charged with the enforcement of the Act, seems to me to be of paramount importance (App. p. 61, 53 F. Supp. 944).
>
> It seems to me that this particular administrative ruling is entitled to even more than the 'great weight' to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling (App. p. 62, 53 F. Supp. 945).

I do not find anything in this record which satisfies me that this ruling was plainly wrong; in fact, I find nothing which casts doubt upon its correctness. Giving to it the 'great weight' to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling" (App. p. 64, 53 F. Supp. 946).

(b) *The Respective Positions of Custom and Usage.*— found that, "beyond any question", the face to face sis was uniformly established by custom and usage in bituminous coal mining industry, whereas this "did not pear to the satisfaction of the Court" in the Muscoda se (App. p. 69, 53 F. Supp. 948).

(c) *The Respective Positions of Collective Bargaining.*— found that the long succession of wage agreements preted by the history of the bituminous coal mining instry providing the face to face basis are "the result of llective bargaining in its complete sense," in which the ployees were represented by a "strong and powerful" ion (App. p. 70, 53 F. Supp. 948), whereas the District urt in the Muscoda Case had found that the wage agreents in the iron mining industry were not "free and unered" agreements on the part of the iron workers but ere dictated almost entirely by the employers" (App. 97, 40 F. Supp. 8).

(d) *The Respective Conditions of Underground Travel.* He found that, whereas the District Court in the Muscoda Case found "that the underground travel was under nditions peculiar to the mining of iron ore which were plete with hazards, highly uncomfortable and requiring ysical exertion . . . ", there were in the underground avel in petitioner's mines "no such painful and burdenne conditions as those described in the iron ore mines" pp. p. 71, 53 F. Supp. 949).

3. The Administrator found essential distinctions between the facts of the two respective industries in relation to underground travel.

As shown hereinbefore, the Administrator issued converse rulings as to payment under the Act for underground travel in these respective industries. His investigation and consideration of the issue with respect to the bituminous coal mining industry covered a period of months and was particularly thorough, as noted in the petition (*supra* p. 6). Of the two rulings he said subsequently in a public statement:

> "The decision we made last July to accept the face-to-face computation of hours worked in bituminous coal mining was reached with considerable difficulty. However, right or wrong, *my bituminous coal opinion was based on a unique situation. Here is a large industry with about half a million employees in which the method of computing hours worked is virtually uniform throughout the industry and has been for many years. Furthermore, it is an industry in which this uniformity in agreement on hours worked has been achieved by national collective bargaining, and arrived at by the employers and the employees year after year in joint meetings which go back for half a century. So far as my knowledge goes the determination of working hours has not been established in this way and with such uniformity in any other industry in the United States.*
>
> "*In the underground metal mining the practice with regard to hours is entirely different*" (R. p. 694).

The essential distinction which the courts below found between the Muscoda Case and the instant case is thus reinforced by the ruling of the Administrator which, as this Court has said, is "entitled to great weight". *United States* v. *American Trucking Associations*, 310 U. S. 534, 549. The opinion of Mr. Justice Reed in *Gray* v. *Powell*, 314 U. S. 402, 411-2, 86 L. ed. 301, is another expression by this Court of the weight to be accorded administrative de-

ermination in applying a statutory term, even when there ras "no dispute as to the evidentiary facts" (p. 412). In he Act now under examination a part of the administrative unction, as pointed out by Mr. Justice Frankfurter in the Iuscoda Case (App. p. 143) is left to the Courts, a circumtance which adds great weight to the trial court's findings vithout detracting from the advisory force of the Administrator's studied conclusion and action within the scope f his responsibility.

4. Conclusion as to Proposition II.

Since (a) all courts, including this Court, in the Muscoda lecisions distinguish and exclude the facts relative to the ituminous coal mining industry, since (b) the District 'ourt in the instant case found essential differences beween the facts of history and of practice relative to underground travel in the respective cases, so as to lead him to onclude that the rule of the Muscoda Case is not applicable to the instant case, since (c) the Administrator lso found such essential differences and arrived at the ame conclusion, since (d) the successful parties in the Iuscoda Case prevailed in their contention that they were not trying the case of the coal miners" (*supra*, p. 18), since e) the issue whether underground travel time is required by he Act to be treated as work time is an issue of fact the deision whereof would differ in a different industry with a different factual picture, it follows that this Court could not n the Muscoda Case be correctly deemed to have decided the ssue here presented as to petitioner's mines in the bituminous coal mining industry. A consideration by this 'ourt of the facts of the instant case ought to be accorded hrough certiorari before it is assumed that this Court has ettled the issue.

PROPOSITION III.

The Equities of This Case Are Such as to Make It Improper for This Court to Permit the Holding of the Circuit Court of Appeals to Stand Without First Giving Full Consideration to the Facts Through a Hearing.

The consequences of the holding of the Circuit Court of Appeals are so harsh as to be shocking. As said by Judge Soper in his dissenting opinion below:

> "This line of reasoning produces such an injustice in the pending case that I am loath to believe that it represents a correct interpretation of the statute or the conclusion which the Supreme Court would reach if the pending case were before it" (App. p. 88).

It is safe to say that this Court would not be inclined to ratify "such an injustice" without prior careful consideration to determine whether the holding is sound. Such consideration cannot of course be had without giving the parties an oportunity to be heard through certiorari.

1. At the time of enactment of the Act, petitioner, and the entire bituminous coal mining industry, had every right to believe, and did believe, that the long established face to face basis of measuring the workweek was, as to this industry, incorporated in the Act by reference.

Mr. Justice Frankfurter, in his concurring opinion in the Muscoda Case, said that the term "workweek" in the Act

> "as applied to workers in this (iron mining) industry and on this (Muscoda) record, has no technical meaning, that is, a meaning so well known to those in this particular industry as to be applied by courts in enforcing the statute when invoked by men in the industry" (App. p. 143).

The opposite situation is presented by the instant case as plainly appears from the following facts:

(a) *Long Familiarity to, and Acceptance by, the Industry.*

The face to face basis of measuring working time was "universally recognized" (App. p. 69) in the bituminous coal industry at the time of enactment, and had been so recognized, as found by the District Court,

> "by the universal custom and usage of the past fifty years and by agreement of the parties in every collective bargaining agreement that was ever made" (App. p. 74, 53 F. Supp. 950).

The Administrator likewise found:

> "Here is a large industry with about half a million employees in which the method of computing hours worked is virtually uniform throughout the industry and has been for many years. Furthermore it is an industry in which this uniformity in agreement on hours worked has been achieved by national collective bargaining, and arrived at by the employers and the employees year after year in joint meetings which go back for half a century. . . . *The determination of working hours has not been established in this way and with such uniformity in any other industry in the United States*" (R. p. 694).

So the face to face basis *was*, in Mr. Justice Frankfurter's phrase, "well known to those in this particular industry."

(b) *Incorporation in NRA Code.*

The face to face basis received the recognition and endorsement of the operators, the union, and the government all three, in the NRA bituminous coal mining Code of 1933, which, as found by the District Court, "was drawn up for the industry by representatives of the union and the operators, and was approved by the President of the United States," providing that the workday "means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period . . . " (App. p. 50, 53 F.

Supp. 939-940). No objection to the face to face basis was voiced in the code hearings by the Union or by any one (R p. 132). John L. Lewis, the president of the Union, testified (R. p. 131), and filed a lengthy brief advocating the Code, in the course of which he said that the

> "work day . . . which generally prevailed . . . in the industry, it should be borne in mind, refers to the time to be spent at the face of the coal vein, and does not include the entire period underground" (R. pp. 656-7).

A provision of the code was the prototype of Section 7 of the Act. The Code provision was:

> " . . . no employee . . . shall be *employed* in excess of seven hours per day and five days per week . . . (R. p. 611).

The term "employed", as there used, did not, as just shown, include travel time. Section 7 of the Act, whose interpretation is here in issue, is:

> "No employer shall . . . employ any of his employees . . . for a workweek longer than, etc."

Until 1943, it was never suggested by any one that the term "employ" as used in the Act had any different meaning from that in the Code, so far as concerned the bituminous coal mining industry. *No reason other than the Muscoda decision has yet been advanced for changing the meaning.*

(e) *Recognition Under Bituminous Coal Act of 1937.*

The Act was under consideration by Congress for several months in the years 1937-8 before enactment. Congress at that time had freshly in mind the economic plight of the bituminous coal industry, having just enacted the Bituminous Coal Act of 1937. That Act, passed for the purpose of stabilizing the economy of the industry (R. p. 203), which had been operating at a deficit for several years

(R. p. 725), authorized the charging of minimum prices, consisting of average production cost (R. p. 203), and set up machinery for arriving at the amount of such prices (R. p. 202). Wages were the chief element of production cost, but in the elaborate and extended hearings which were held pursuant to that Act (R. p. 202) in which the Union and the operators were continuously represented (R. p. 203), it was never once suggested that wages should include payment for travel time (R. p. 204). The face to face basis was consistently recognized.

(d) *The Congressional Proceedings Showed Absence of Any Sentiment for, or Suggestion of, the Change.*

John L. Lewis' testimony at the extended committee hearings, quoted from by the District Court (App. p. 57-8, 53 F. Supp. 943), made it clear that there was no expectation on the Union's part that the Act would affect the wage standards of the bituminous coal mining industry. The exchanges between him and committee members definitely show that he saw nothing in the Act applicable to this industry in which, as he saw it, the standards of wages and hours established through collective bargaining were "much higher than the minimum fixed by Congress" (Committee Hearings pp. 296-7). The failure of the operators to appear at all attests the fact that they were of the same belief. The expressions quoted by the District Court from the President and from the members of both Senate and House in the hearings and debates are to like effect (App. p. 59-60, 53 F. Supp. 943-4). It is a clear inference that no one in the industry or in Congress saw in the Act anything which would make mandatory any changes in the wages, hours or practices as then established through collective bargaining. As said by the District Court:

> "Thus it seems to me clear that it was neither the intent of Congress, nor the desire of the union, in the enactment of the Fair Labor Standards Act of 1938 to interfere in any way with the wage structure of the

bituminous coal industry" (App. p. 60-1, 53 F. Supp. 944).

The bituminous coal mining industry had no reason to suppose that the Act was intended to render illegal the established face to face basis of measuring working time in that industry, and every reason for the contrary belief.

2. After the passage of the Act, both the Union and the operators and the Administrator were in agreement that the Act did not require any change from the face to face basis.

After the effective date of the Act, the respective collective bargaining agreements of 1939 and 1941 were made, including the same face to face basis as always. The Union made no suggestion that the Act required a change. In 1940 the question was raised for the first time whether the Act required underground travel time to be treated as work time (R. p. 135, 140). An investigator of the Wage and Hour Division raised the question and on investigation reported that the face to face basis "was the proper one to be applied in the coal mining industry" (App. p. 51, 53 F. Supp. 940). As found by the District Court, "both the operators and the union officials were definitely opposed to any construction of the . . . Act which would require payment for travel time" (App. p. 51, 53 F. Supp. 940). They united in a written statement to the Administrator calling attention to the fact that the

> "method of measuring working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense . . . Travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898 . . .
>
> " . . . Any ruling requiring such a change in the custom, tradition and contract provision so as to

change the workday from . . . 'work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos . . . Such a ruling moreover would establish such diversity of time actually spent at productive work as between different bituminous coal mines . . . that there would be no basis on which any general wage scale could be predicated, collective bargaining would . . . be rendered impossible . . . , and the very purpose of the Fair Labor Standards Act would be defeated. . . . This would be a most unhappy result to flow from an Act that was passed by Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines.

"*The great amount of money involved in the case of extra payment by the operators*, or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry) as complying both with the provisions of the Fair Labor Standards Act and of the Interpretative Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act'." (App. p. 53, 53 F. Supp. 940-1).

Thereafter the Administrator issued a ruling that the face to face basis was within the requirements of the Act in the bituminous coal mining industry; the case of Monroe Coal Mining Company, in which his consideration

of the question occurred, was closed accordingly; and, as found by the District Court:

> "It was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the workweek . . . " (App. p. 54, 53 F. Supp. 941).

So the industry was again confirmed in the allowability of the face to face basis, the long standing agreement of the operators and the Union thereon being reaffirmed with great emphasis, and the Administrator having concurred. *It would scarcely be contended by anyone that in these circumstances the operators ought to have attempted to change from face to face to portal to portal.* They would have had no reasonable justification for doing so. The uncontradicted evidence shows that a major economic convulsion in the industry would have resulted, as well as a major clash with the Union. And no voice would have been raised in their defense. *Not even could the present action have been then maintained, since no justiciable controversy existed. The operators could not have made the change, even if they had so desired.*

3. The great lapse of time between the effective date of the Act and the reversal of position by the Union has operated to accumulate a vast potential liability under the Act. The passage of time and its effects constitute an important fact in the case.

In 1939 when the collective bargaining agreement of that year was negotiated, the maximum weekly hours under the Act were 44. Since the industry was operating on a 7-hour day and a 5-day week (total 35 hours), travel time could not, in petitioner's mines, even if counted as work time, produce overtime. When, in 1940, the Administrator's ruling was issued, the maximum weekly hours under the Act were 42. This still left a sufficient margin against overtime in petitioner's mines. But on October 24, 1940,

the maximum weekly hours under the Act sank to 40. This did not leave a sufficient margin, because underground travel time consumed more than an hour per day. From that date, if the holding of the Circuit Court of Appeals is sustained, potential liability began to mount by leaps and bounds. The Act provides not only payment of time and one-half for overtime but also an addition of 100% as liquidated damages for failure to pay. The Virginia three-year statute of limitations forecloses claims accruing prior to September 27, 1940 only.

But much more was yet to come. Under date of February 10, 1943 (R. 135, 734), the operators and the Union, on request of the President of the United States, negotiated a supplementary collective bargaining agreement providing for an additional 7-hour day per week thus initiating *a 42-hour week, measured from face to face* (R. pp. 135, 734). Obviously this agreement eliminated the entire previous margin between the 35-hour week under the contract and the 40-hour week under the Act, so that from then on, if travel time was to be counted, liability commenced to accrue for all travel time as overtime at one and one half times the regular rate of pay and with the one hundred percent liability added. What this means is at once apparent when it is considered that there were 444 underground employees in petitioner's No. 1 mine alone, each of whom had 88 minutes of travel time *per day.*

When the 6-day week was agreed upon, the Union still had not reversed its position as to the face to face basis. All parties concerned—the operators, the Union, the Administrator—were still in agreement that the Act did not affect it. So the industry agreed to the 6-day week, to avert an impending national coal shortage, on the understanding that only two hours of overtime per week were to be cared for. The crushing weight of the potential liability now resulting is mentioned in the petition (*supra*, p. 7-8).

When the Union subsequently reversed its position and contended for the portal to portal basis, it did so, *not because its previous conviction as to the proper construction of the Act had changed,* but, as found as a fact by the District Court, the Union

> "only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines . . . Thus the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the . . . Act requires inclusion of the actual travel time as work time for those who have actual travel time underground" (App. p. 54-5, 53 F. Supp. 941-2).

As a prerequisite to engrafting upon the Act at this late day a rigid definition of the questioned term such as would overrule the industry—employers and employees alike—, the Administrator and the trial Court, and work such shocking hardship, a consideration of the very facts and circumstances involved through a hearing of the case by certiorari, would certainly seem to be in order. The language of this Court in *Helvering* v. *Griffiths*, 318 U. S. 371, 402, 87 L. ed. 843, 863-4 is pertinent:

> "We are asked to make a retroactive holding that for some seven years past a multitude of transactions have been taxable although there was no source of law from which the most cautious taxpayer could have learned of the liability. If he consulted the decisions of this Court, he learned that no such tax could be imposed; if he read the Delphic language of the Act in connection with existing decisions, it, too, assured him there was no intent to tax; if he followed the congressional proceedings and debates, his understanding of nontaxability would be confirmed; if he asked the tax collector himself, he was bound by the Regulations of the Treasury to advise that no such liability existed. It would be a pity if taxpayers could not rely on this concurrent assurance from all three branches of the

Government. But we are asked to brush all this aside and simply to decree that these transactions are taxable anyway."

4. Comparable equities did not arise in the Muscoda case.

The facts in the Muscoda Case are so wholly different, that no argument can be made that this Court disregarded similar equities in that case.

(a) *The respective amounts of travel time involved.*—In the iron mining industry little underground travel was involved, open-pit operations being the rule (Muscoda Case Rec. Vol. VI., 44, 47-49).

(b) *The respective rulings of the Administrator.*—The Administrator issued a ruling under date of March 15, 1941, applicable to the iron mining industry that

> "The work day * * * starts when the miner reports for duty as required at or near the collar of the mine and ends when he reaches the collar at the end of the shift" (i. e. portal to portal) (App. p. 104, 40 F. Supp. 10).

In the complaints filed in the Muscoda Case it was alleged and undenied that upon the issuance of this ruling and prior to the institution of the actions, 'because of the perils of litigation, the irreparable injury to which the operators would be subjected if the opinion of the Administrator was judicially held to be correct, and the resulting great loss in money and in the output of iron ore, the operators in the iron mining industry, under protest, had adjusted their operations so as to comply, pending the judicial determination of the question, with the ruling of the Administrator.' So no unwieldy accumulation of potential liability was built up in that industry, because of the tenor of the Administrator's ruling *and the consequent early date of the change to the portal to portal basis.*

(c) *No reversal of union position in the iron mining industry.*—Both the Administrator and the unions took the

position from the outset that face to face was illegal in the iron mining industry under the Act, and never took a position that it was legal.

(d) *The respective importance of the face to face basis in the two industries.*—The competitive positions of the units in the iron ore industry were never anchored to the face to face basis through area freight rates and uniform wage schedules, as had long been the case in the bituminous coal mining industry.

(e) *No NRA Code affirmance of face to face in the iron mining industry.*—The iron mining industry had not had an NRA code based upon face to face, as had been the case in the bituminous coal mining industry.

(f) *No unbroken course of custom and usage in the iron mining industry.*—The iron mining industry had not had a long and unbroken course of custom and usage and of uncoerced collective bargaining buttressing the face to face basis, as had been true in the bituminous coal mining industry (Opinion of District Court, Muscoda Case, App. p. 97, 40 F. Supp. 7-8).

(g) *No 6-day week in the iron mining industry.*—The iron mining industry had no collective bargaining contract for an enlarged workweek based on face to face, in response to governmental request for greater production to meet national emergency demands.

(h) *No "painful and burdensome" conditions of travel in bituminous coal mining industry.*—Owing to the effects of a half century of collective bargaining with a "strong and powerful union", underground travel in petitioner's mines "is neither painful nor unduly uncomfortable and is less hazardous than other phases of mining operations" (Opinion of District Court, App. p. 49, 53 F. Supp. 939). It presents "no such painful and burdensome conditions as those described in the iron ore mines" (Opinion of District Court, App. p. 71, 53 F. Supp. 949). Consequently

petitioner had no such reason to regard underground travel time as work time, as was the case in the iron ore industry.

5. The Circuit Court of Appeals was mistaken in supposing that petitioner and the bituminous coal mining industry in general have necessarily been released from the vast potential liability which would ensue if the holding of the Circuit Court of Appeals were sustained.

It is said by the Circuit Court of Appeals below that

> "The disturbing effect of the decision here will not be so great as it otherwise would in view of the fact that by agreement between the miners and operators, the portal to portal system of computing the workweek has now been adopted in the industry. An amended answer filed in the cause waives the right to additional wages due under the Act prior to April 1, 1943 * * *; and the amount claimed as additional wages between April 1 and June 20, 1943, is only the amount voluntarily awarded the workers in other mines as a result of the settlement arrived at when the portal to portal basis was adopted" (App. p. 86).

The Circuit Court of Appeals was here laboring under a serious misapprehension. This is made clear in the dissenting opinion of Judge Soper:

> "It is suggested in mitigation of the harsh effect of a decision adverse to the Mining Company that the amount claimed by the miners in this case has been limited, by amendment of the counterclaim, to the period beginning April 1, 1943 and ending June 20, 1943. Indeed it is assumed in the briefs that each miner's claim is limited to the sum of $40 and that the total sum involved is approximately $40,000. These statements cannot be verified in the record. The amendment to the counterclaim is not limited to the period ending June 20, 1943 but contains merely the assertion that the miners will not further assert their claims to travel time prior to March 31, 1943. The end of the period for which the claim is made is not stated; nor is the amount of the claim defined. The assumed limitation of the period to June 20, 1943, and to the sum of

$40 per miner seems to be based on the terms of agreements entered into between the union and other mining corporations; but so far as the record discloses, the Jewell Ridge Coal Corporation has never entered into a new agreement or paid for travel time. If a claim is asserted for the full amount due under the Act, as now interpreted by the miners, a very much larger sum than $40,000 will be involved in this controversy.

Moreover, the decision may be of grave importance in its application to other mine owners who have not dealt with the union or have not signed wage agreements. If the new interpretation of work time is applied to them over the period that has elapsed since the passage of the Act, subject only to local statutes of limitations, and double payment is exacted under the penal sections of the Act, it may be that the mine owners will be subject to losses of huge amounts. Indeed the decision might prove even more sweeping in its effect for it might invalidate the compromise provisions respecting pay for travel time and liquidated damages that form part of contracts between the mine owners and the union in a large part of the industry. If portal to portal pay is required under the Act as a matter of law, such settlements are not binding if the amount paid is less than the actual wages due under the Act; and the mine owners would become liable not only to make up the deficiency but to pay an equal amount in addition as liquidated damages. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. See also, *Guess* v. *Montague*, 4 Cir., 140 F. 2d 500; *Fleming* v. *Warshawsky & Co.*, 7 Cir., 123 F. 2d 622; *Johnson* v. *Dierks Lumber & Coal Co.*, 8 Cir., 130 F. 2d 115; *Rigopoulon* v. *Kervan*, 2 Cir., 140 F. 2d 506; *Birbalas* v. *Cuneo Printing Industries, Inc.*, 7 Cir., 140 F. 2d 826.

These considerations give force to the conclusion that Congress could not have intended to compel mine owners to pay large increases in wages over and above those specified in prevailing agreements, and also to inflict upon the mine owners additional sums in the nature of a penalty by giving to the term "workweek" as used in the statute, a significance contrary to that which by voluntary agreement and by long continued custom had prevailed in the industry."

As stated in the petition (*supra,* p. 7-8), the potential liability of petitioner, under the contingencies mentioned by Judge Soper, merely for the period from April 1, 1943, to November 3, 1943, is estimated at approximately $300,000.00, while if the union's voluntary disclaimer applicable to the period prior to April 1, 1943, is not binding upon petitioner's individual employees, the total potential liability, under those contingencies, would approximate a million dollars.

With regard to the "settlement" supposed by the Circuit Court of Appeals to have been effected with certain other units in the industry by the Union, the decided cases cited by Judge Soper hold that such settlements will not be recognized by the courts. As to other units in the industry which have made no contracts or "settlements" with the Union, the majority opinion of the Circuit Court of Appeals does not undertake to give them any hope at all for escape from ruin.

As for the "adoption" of portal to portal by "agreement between the miners and the operators" mentioned in the majority opinion of the Circuit Court of Appeals (App. p. 86), this occurred subsequent to the trial of this case and hence is *dehors* the record. For the most part the presently effective agreement follows the second Illinois Supplementary Agreement of September 23, 1943 (R. pp. 779-785) and contains the following provision:

> "16. This Supplemental Agreement is an integrated instrument and its respective divisions are interdependent, and shall be in effect only after the approval hereof by the appropriate governmental agencies and *after the granting by the Office of Price Administration of advances in maximum prices sufficient to cover the increased costs occasioned hereby.* (R. p. 785)

It is true that there has been achieved *through collective bargaining* a shift from the face to face basis to portal to portal with an assumed travel time factor. That under wartime absence of competition this has proved workable

is no assurance that it will continue so when competitive conditions recur. Rather the fact that the shift was made not by force of law but by collective bargaining, and in response to the abnormal circumstances of war, argues in favor of leaving treatment of the questioned term to the further processes of collective bargaining without the restraint of a rigid definition imposed by law.

The disturbances to the industry consequent upon portal to portal, which the majority opinion belittles, are merely held in abeyance pending the war. Upon the return of the industry to a competitive basis, the ills testified to by representatives of the operators and the union alike, as quoted hereinbefore (*supra*, p. 30-1), will inevitably appear. As said by the District Court:

> "*The bituminous coal industry is sui generis.* Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry" (App. p. 56, 53 F. Supp. 942).

CONCLUSION.

In view of the strong considerations supporting the prayer of the petition and hereinbefore pointed out, we respectfully submit that certiorari ought to be granted.

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APPENDIX

JEWELL RIDGE COAL CORPORATION

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, ET AL.

Civil Action No. 73.

District Court, D. Virginia, at Abingdon.

Jan. 25, 1944.

Action for a declaratory judgment by Jewell Ridge Coal Corporation against Local No. 6167, United Mine Workers of America, and others, to determine whether the time spent by plaintiff's employees in traveling from portals of mines to their usual working places and return constitutes working time required to be included in the work week under the Fair Labor Standards Act, wherein petition of the Southern Coal Producers Association for intervention was denied.

Order directed to be entered declaring rights of parties in accordance with opinion and dismissing the action.

See also 3 F. R. D. 251.

* * * * * * * * * * *

BARKSDALE, District Judge.

Statement of the Case.

This is a declaratory judgment action instituted by Jewell Ridge Coal Corporation, the owner and operator of two bituminous coal mines in this District, against two locals of the United Mine Workers of America and certain officials and committee members thereof, District No. 28, United Mine Workers of America, and its officers, and International Union, United Mine Workers of America and its president. The two defendant locals of the Union comprise all of the underground mine workers employed by plaintiff, said two

locals being within the jurisdiction of said District 28, said District 28 in turn being a component of the International Union, United Mine Workers of America. The complaint alleges, the joint answer of all defendants admits, and the evidence proves, the existence of an actual justiciable controversy between plaintif and defendants as to the construction of Section 7 of the Fair Labor Standards Act, 29 U. S. C. A. § 207. By pretrial order, it was stipulated that the issues to be now tried in this action are as follows:

"a. What constitutes the working time which makes up the work week of plaintiff's underground employees within the meaning of Section 7 of the Fair Labor Standards Act of 1938, and what amounts, if any, are due and unpaid to such employees under said Section, the determination of such amounts, if any, to be later referred to a special master:

"(1) In reference to 'a' above, the plaintiff contends that such work week does not include that portion of the time spent by its underground employees in being transported or walking to and from their usual working places.

"(2) In reference to 'a' above, the defendants contend that such work week includes all the time from the time such employees are required to report and do report for work at the portal of the mine until they return to the portal at the end of the shift, less the regular lunch period when they are relieved of all duties."

Neither side having demanded a jury, evidence adduced by both sides has been fully heard in open court by the court without a jury, oral argument has been heard, and briefs have been filed on behalf of both sides, and a brief has also been filed by Southern Coal Producers Association [of which plaintiff is a member], whose petition for intervention was denied, but which was permitted to participate as an *amicus curiae*.

This action having been tried upon the facts by the court without a jury, the court doth hereby find the facts specially and state separately its conclusions of law thereon, and directs the entry of the appropriate judgment, as follows, in conformity with Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c:

Findings of Fact.

Plaintiff, Jewell Ridge Coal Corporation, owns and operates two coal mines within this District, the older one being known as the "Jewell Ridge Mine" and the other being known as the "Jewell Valley Mine". The Jewell Ridge Mine was opened in 1910, and the Jewell Valley Mine in 1936. Both mines having been in operation for a number of years, the coal now being mined is at a considerable distance from the driftmouth or portal of the mines. Jewell Ridge being the older mine, the distances there are naturally greater, and vary from approximately 4,250 feet to 25,460 feet; at Jewell Valley, the distances vary from approximately 4,600 feet to 14,450 feet. Approximately 500 men are employed at each mine. Although there are slight differences, the methods of operating the two mines are substantially the same.

The coal which is mined at these two mines exists in seams, the thickness of which varies in the two mines from 32 to 54 inches. The main tunnels into the mines, from which coal has been extracted, are known as "haulage ways". From these haulage ways, laterals have been driven which are called "cross entries". These cross entries give access to, and form the boundaries of, "rooms", from which all the coal is taken except the pillars that are left to support the roof. Electric railways are operated for the removal of the coal when mined, and then men are also transported to and from their places of work on these railways. The company has numerous employees for the operation and maintenance of these railways and the electric power systems and the maintenance of safety within the mines,

such as motormen and brakemen, trackmen, bratticemen, wiremen, and a bondman. These employees are all called "company men" and are paid at hourly rates. The employees who actually extract the coal from the seams, are known as "machinemen" and "coal loaders". The method is about as follows: Between shifts, the machinemen place their cutting machines at the faces of the seams. Each machineman then makes a cut or kerf, approximately six inches in height, at the bottom of the seam of coal and parallel to the floor, which cut extends across the width of the room or working place and back into the seam to the depth of six or eight feet. The fragments from this cutting, called "bug dust", are first removed by the "coal loader" when he begins his work, by means of a long-handled shovel. The loader then bores holes at the top of the seam of coal to the same depth as the undercut. He then places explosives in these holes and fires them. These explosions dislodge the entire section of coal which has been undercut, pushing it down and outward. The loader, with his pick and shovel, then proceeds to load the coal thus shot down, into empty coal cars placed adjacent to his work place by operators of gathering motors. The coal is then hauled out to the tipple, processed, graded, and ultimately loaded into railway cars for shipment. All coal loaders, and ordinarily, the machinemen, are paid upon a piece-work basis, that is, at an agreed rate for each ton of coal. The hours of labor of these piece-work employees are, however, important, because they are paid a time-and-a-half rate, or more accurately, a rate-and-a-half rate, for coal extracted by them after the expiration of seven hours of labor.

All plaintiff's employees are required to be at their places of work, for the morning shift, at 8 o'clock, A. M. The men come from their homes to the mines in various ways. Some walk, some come in their own cars at their own expense. More than 400 come in trucks and buses operated for that purpose by the plaintiff company and certain individuals, the expense of such transportation being borne by the com-

pany. The employees arrive at the mines at various times, but each in time to board the "man-trip" which is to take him to, or near, his respective place of work. "Man-trips" are trips made by trains of mine cars drawn by electric locomotives for the purpose of transporting the underground workers to or near their respective places of work. Employees leave the trains at the "man-trip stations" which are nearest to their respective places of work, and walk the rest of the way.

Upon arrival at the mines, each underground worker first obtains his lamp from the company's lamp house near the portal, which is an electric light that has been charged while the employee is off duty. Each underground worker carries with him such drinking water as he needs for the day, as well as his lunch.

After securing their lamps, various men do various things before taking the man-trip. Coal loaders, the most numerous class, do nothing, unless they have brought tools out for repair. Some four or five times a month, they bring tools out for repair, and on such occasions they go by the blacksmith shop and obtain their repaired tools. The bondman, wiremen, brattiemen, trackmen, and such machinemen as ride man-trips, get such tools as they may have brought out of the mine from the tool house, and such supplies as they may need for the day, from the supply house, and load them into the tool cars of their man-trips. However, if these men so desire, they have the option to give their orders for supplies to the section foreman, and such supplies will be delivered on their section overnight by the supply crew. Some machinemen use motors, and those who do, get two gallons of oil from the oil house, approximately 50 pounds of machine bits from the blacksmith shop, and such other equipment as may be necessary, and load such supplies and equipment onto their motors. They get their motors out of the yard, switch them to the sand house, where they fill their four sand boxes and oil the motor. They then run their motors to their assigned places of oper-

ation in the mine. Motormen and brakemen go through substantially the same process of getting out their motors and oiling and sanding them, as the machinemen do, before proceeding in the motors to their places of work. These preliminary activities require variously from three to ten minutes.

As previously stated, "man-trips" are for the transportation of underground workers to or near their places of work. They are operated by, and at the expense of, the company. At the Jewell Valley Mine, all underground workers use the man-trips to travel from the main portal to their places of work at Jewell Ridge, approximately. 72 men enter the mine at places other than the main portal and catch the man-trips at some man-trip station inside the mine, or walk all the way to their places of work. Their lamps are brought to them by their section foremen. Transportation for employees by man-trips is necessary for the successful operation of the mines. They constitute a benefit to both employer and employees. They benefit the company in promoting safety, orderliness and increased productiveness; they benefit the employees by saving their time and energy, and thus increase their productiveness.

Each man-trip is composed of a train of empty mine cars such as are used to haul coal, drawn by an electric motor or locomotive. The first car after the locomotive, is the tool car, in which is hauled all mining tools and supplies of the men who ride that man-trip. No one is permitted to ride in the tool car. Ordinarily, seven men ride in each of the other cars of the train, never more than eight. Each car is about 12 feet long and seven feet wide inside. The bottom, or lowest part of the car, is 2 feet, 6 inches wide. Alongside of that area, and rising above it, is a sort of bench approximately 2 feet, 3¾ inches, wide, and above that, rise the outside walls of the car to the height of 11 inches. Men riding in these cars ordinarily sit on the bench, or, where the top is low, in the bottom of the car. The man-trips are scheduled, those going the greatest distances leaving first, and an interval between trains of at

least 500 feet is maintained. The movement of the trains is governed by dispatchers, and the speed of the trains is kept within a maximum of six miles per hour as nearly as practicable. Each man-trip is under the supervision of a foreman, who sees to it that safety rules and regulations are complied with. During the course of the man-trips, foremen occasionally give instructions to employees as to the work they are to perform at their working stations. Such instances are rare, as instructions are ordinarily and customarily given at the working place. No work or labor is required of employees while riding on man-trips, and supervision is limited to the enforcement of safety rules and regulations. Those riding on man-trips sit upright where the roof is high enough, but find it necessary to bend over where the roof is low. Riding on man-trips, while definitely not luxurious, is neither painful nor unduly uncomfortable, and is less hazardous than other phases of mining operations. All coal mining operations are relatively hazardous. During 1941, the last year for which statistics are available, there were reported to the United States Bureau of Mines, 47,742 accidents, of which, 1,075 were fatalities. Assuming that 450,000 men were then engaged in coal mining, the reported accidents represent an accident of some character to more than one out of every ten coal miners during that year. In view of these statistics, and the number of men traveling daily on man-trips in plaintiff's mines, the injuries shown by the evidence to have been received by employees in plaintiff's mines on man-trips are surprisingly few in number and extent.

If Section 7(a) of the Fair Labor Standards Act requires inclusion of travel time as work time, many, if not all, of plaintiff's underground employees have not received all the compensation required by the Act.

Both plaintiff's mines, from the very beginning, have always been operated on the "face to face" basis. The "face to face" basis means that hours of labor are computed on the basis of work at the usual working places, and therefore excludes any consideration of travel time spent in reach-

ing the usual working places and returning therefrom. The "face to face" basis is traditional in the bituminous coal mining industry in this country, and has universally been the basis for the determination of hours of labor therein for approximately the past fifty years. In England and Continental Europe, the basis has been "bank to bank", or portal to portal, or some modification thereof.

Plaintiff's employees were first organized and became members of the United Mine Workers of America in 1933 following promulgation of the NIRA Code of Fair Competition for the Bituminous Coal Mining Industry. This NIRA Code of Fair Competition was drawn up for the industry by representatives of the Union and the Operators, and was approved by the President of the United States. It provided for the "face to face" wage basis by the use of the following language:

"* * * and this means seven hours work at the usual working places for all classes of labor exclusive of the lunch period. * * *"

Basic wage agreements were entered into by the Union and the Operators, as of April 1, 1934 (continued in effect by successive extension agreements from March 31, 1935, until October 1935), as of October 1, 1935, as of April 2, 1937, and as of May 12, 1939. All these agreements were the result of collective bargaining. The last mentioned agreement, as of May 12, 1939, to extend for a period of two years, was made when the Fair Labor Standards Act was nearly a year old and had been in effect for more than six months. Nevertheless, it, as well as the previous wage agreements, provided for the "face to face" wage basis, necessarily excluding all travel time from the work week. Also the last basic wage agreement reached by collective bargaining, dated April 1, 1941, to extend for a period of two years, provided for the "face to face" basis, in the familiar language of the preceding agreements.

Early in 1940 an investigation by the Office of Wage and Hour Administration of the operation of the Monroe Coal

Mining Company in Pennsylvania was begun, to determine whether or not that company's operating practices complied with the Fair Labor Standards Act. In the course of that investigation, the investigator raised the question of whether or not underground travel time of employees must be included in the work week under the terms of the Act. After an extended investigation, the investigator made an exhaustive report in which he discussed at length the matter of travel time and stated as his opinion that the "face to face" basis, excluding travel time, was the proper one to be applied in the coal mining industry, but he indicated that if the rule as applied in the Cornucopia Gold Mining Company case were applied, the Monroe Company would owe its underground workers approximately $70,000.

This situation was brought to the attention of Mr. Charles O'Neill, President of the Central Pennsylvania Coal Producers Association and a Director of the Monroe Company. He in turn brought it to the attention of other coal operators and of Mr. John L. Lewis, President of the International Union, United Mine Workers of America. Thereafter, representatives of the coal operators and the United Mine Workers conferred from time to time with representatives of the Office of Wage and Hour Administration. Both the Operators and the Union officials were definitely opposed to any construction of the Fair Labor Standards Act which would require payment for travel time. On July 9, 1940, the members of the Appalachian Joint Conference Negotiating Committee for the Operators, and Mr. Earl E. Houck, Director of the Legal Department, for the United Mine Workers of America, jointly composed and sent a letter to Col. Philip B. Fleming, Administrator of the Wage and Hour Division, fully setting out their views on the subject. Amongst other things in their letter, they said:

"This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense. * * *

"The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

"It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places' to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would

be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

"For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of the Interpretive Bulletin No. 13, to the effect that 'reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act.'

"We therefore respectfully request that your Division issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act."

By letter of July 18, 1940, from Col. Fleming, Administrator, to Mr. Houck, Director of the Legal Department of the United Mine Workers of America, Col. Fleming, referring to Mr. Houck's letter of July 9, 1940, just referred to, said in part:

"In view of the circumstances which you describe in your letter, and in view of the special facts which were developed at conferences with representatives of the industry, it is our opinion that the practice of computing working time on a 'face to face' basis in the bituminous coal industry would not be unreasonable."

Promptly thereafter, Col. Fleming issued a public statement on July 27, 1940, in which he said in part:

"In view of the circumstances described by the industry in submitting its inquiry, Colonel Fleming announced that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable. Colonel Fleming explained the term 'face to face' to mean the productive work performed after the miner arrives at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening."

The Monroe Coal Mining Company case was then closed, and it was thus administratively determined that the provisions of the Fair Labor Standards Act did not require the inclusion of travel time in the work week of the underground employees in the bituminous coal mining industry.

The United Mine Workers Union has never, in any way contended that travel time was work time under the Fair Labor Standards Act until the Wage Conference of March, 1943, and only contended for it then as an additional basis for its demand for a general wage increase to all mine workers, both inside and outside the mines. The 1943 demand of the Union, under the heading "Hours of Labor", for travel time, is as follows:

"To conform with the basic and legal requirement for the industry, the maximum hours and working time provisions be amended to establish portal to portal for starting and quitting time for all underground workers."

The succeeding demand, under the heading "Wage Rate Increases", calls for a two dollar a day flat wage increase "for all classifications of inside and outside day men", and equivalent increases for piece workers, and provides:

"The increased rates include compensation to meet the portal to portal starting and quitting time."

Thus, the 1943 demand of the Union is actually a demand for a flat wage increase to all mine workers, whether or not they spend any time traveling underground to their usual places of work, and not truly a contention that the Fair Labor Standards Act requires inclusion of the actual travel time as work time for those who have actual travel time underground.

Conclusions of Law.

The crucial question which I now have for determination, as set out in the pretrial order, briefly stated, is whether or not the time spent by plaintiff's underground employees in being transported or walking from the portals of the mines to and from their usual working places constitutes working time which must be included in the work week of plaintiff's underground employees by reason of the Fair Labor Standards Act of 1938.

The pertinent portions of the Act are as follows:

"Section 7. (a) No employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce— * * *

"(3) for a work week longer than forty hours * * *, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U. S. C. A. § 207(a) (3).

"Section 3. (g) 'Employ' includes to suffer or permit to work." 29 U. S. C. A. § 203(g).

It will be readily conceded by all, that travel by employees from the portal to their places of work, and return, is not for the pleasure, relaxation or amusement of the employees, but it is to be carefully noted that the question is not whether it would be fair for the employer to pay employees for this travel time, or whether I think the employees should be paid for travel time; the real question is whether the language of the Act *requires* such payment. The language of the Act certainly does not in definite terms cover the question here

presented. So it would seem advisable to look into the legislative history of the Act.

Legislative History of the Act.

I can neither find, nor has anything been pointed out to me, in the legislative history of the Fair Labor Standards Act of 1938, which indicates that it was the intent of Congress to make so radical a change in the wage structure in the bituminous coal industry as to require payment for underground travel time. It is idle to say that, because employees in other industries are compensated under the Act for travel time under various and diverse conditions and circumstances, underground employees in the bituminous coal industry under and by virtue of the Act, must be paid for travel time. Circumstances alter cases. Under some circumstances, travel time is work time: under other circumstances it is not. The bituminous coal industry is *sui generis*. Its problems have been before Congress for many years. It is one of the few industries, for the regulation of which special Acts of Congress have been passed such as the two Guffey Acts. It is a highly competitive industry. Not only is there competition between the individual coal operators: there is competition between the northern operators and the southern operators, and always there is the sharpest kind of competition between the producers of bituminous coal and the producers of other fuels such as oil and gas. These conditions and many others are important factors which must be regarded in making up a wage structure for the bituminous coal industry. And in this industry, the wage structure is of peculiar importance because the cost of labor makes up approximately two-thirds of the cost of the production of coal. Of course, the Fair Labor Standards Act applies to the bituminous coal industry, as it applies to all interstate industry, but in situations not precisely covered by the language of the Act, its legislative history, as well as all the facts and circumstances, should be examined.

The first general regulation of wage and hour standards for private employment was embodied in the National Industrial Recovery Act, 48 Stat. 195. In the Bituminous Coal Code, adopted under the NIRA in 1933, travel time was definitely excluded, and the "face to face" basis was adopted by the following language:

"No employee shall be required or permitted to work more than eight hours in any one day *at the usual working places* * * *." (Italics mine).

Similarly, in the 1934 amendment, it was provided that:

"Seven hours of labor shall constitute a day's work, and this means seven hours' work *at the usual working places for all classes of labor*, exclusive of the lunch period, whether they be paid on the day or the tonnage or other piece-work basis; * * *" (Italics mine).

This Code remained in effect until 1935, when the National Industrial Recovery Act was held unconstitutional.

In 1937, fair labor standards bills were introduced in both Houses of Congress, and extensive committee hearings were held on these bills. Mr. John L. Lewis, President of the United Mine Workers of America, testified at length, and at no time indicated that travel time should be included as work time. On the contrary, he indicated that he did not expect the bill to affect the coal industry. The following excerpts are from his testimony:

"Senator LaFollette. * * * As I understand it, the objective of this bill as outlined in Section 23, one of them is to prevent the board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona-fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization." (Page 280.)

"Mr. Lewis. * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the

collective-bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry and order a modification thereof. I think the power of the board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of section 5 now. I see a drift toward the complete fixation of wages in all industry by governmental action." (Page 281.)

"Senator Holt. Would you favor allowing the board to investigate collective bargaining agreements where the collective bargaining agreement was beyond the wage level?

"Mr. Lewis. No; I see no point in it.

"Senator Holt. If they have a right to investigate collective bargaining agreements below the wage level why should not they have the right to investigate collective bargaining agreements above the wage level?

"Mr. Lewis. Merely because their right of investigation of agreements that were substandard would be for the purpose of ascertaining whether that was so and of modifying them to meet the congressional standards". (Page 297.)

Excerpts from "Joint Hearings Before the Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, June 2-22, 1937."

In its report on an amended bill in the nature of a substitute, the Senate Committee on July 6, 1937, said:

"The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage." (Senate Report No. 884, 75th Cong.)

During the debates on the bill, numerous statements were made indicating that it was not the intent of Congress to interfere with the process of collective bargaining. The following are of interest:

"Mr. Walsh. Next, does the bill affect collective bargaining agreements already made or hereafter to be made between employer and employee?

"Mr. Black. It does not." (Senate, July 27, 1937. Congressional Record, Vol. 81, p. 7650.)

"Mrs. Norton. * * * It is not the intention of this amendment, or of the bill, to start fixing wages in all industries but only in those in which oppressive wages are being paid to a substantial portion of workers. * * * " (House, December 13, 1937, Congressional Record, Vol. 82, p. 1391.)

"Mr. Randolph. * * * It (the bill) is not concerned with that fortunate majority of the laboring classes whose collective bargaining power is sufficiently potent to insure the preservation of their industrial rights.

"But is is concerned with those millions in industry who are unprotected and unorganized. * * * " (House, December 13, 1937, Congressional Record, Vol. 82, p. 1395; Parenthesis supplied.)

"Mr. Curley. * * * There is no conflict of jurisdiction under the provisions of this fair standards of labor bill, and the existing labor organizations of this country. The bill concerns only of relieving the paralysis which, at present, shackles misery and poverty to millions of heads of families, who are underpaid and causing a colossal financial loss in purchasing power because of existing deplorable conditions." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7285.)

"Mr. Boileau. * * * What is more, we are preserving for organized labor its right to bargain collectively and it will bargain for a higher wage than that." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7290.)

"Mr. Allen. * * * This bill has a threefold purpose as I see it. First, it eliminates sweat shops— * * * The bill

does not affect organized labor, but those 5,000,000 American working men and women who have not yet been benefited by organized labor." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7291.)

"Mr. Fitzgerald. * * * I would have you observe that this proposed legislation will not improve the wages and hours of the majority of workers, nor does it attempt to. For I am greatly pleased to say that the majority of workers do not need this legislation because they are receiving a living wage and are not forced to work unreasonable hours." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7310.)

Although the above statements were made at various times while the measure was being amended and revised, and therefore not with respect to the Bill in its final form, they show a continuing intention not to interfere with the processes of collective bargaining.

No such statute was enacted in 1937, and in regard to wage and hour legislation, in his message delivered on January 3, 1938, the President said:

"We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining." (Congressional Record, Vol. 83, p. 9.)

Shortly before the passage of the Fair Labor Standards Act of 1938, Congressman Connery, one of its patrons, said of it:

"The thing to remember about this bill is that it is not designed to be a cure-all for industrial wages. It is merely aimed at wiping out sweatship conditions and child-labor. Those are the two salient features and should be kept in mind." (House, May 23, 1938, Congressional Record, Vol. 83, p. 7322.)

Thus, it seems to me clear that it was neither the intent of Congress nor the desire of the Union, in the enactment of the Fair Labor Standards Act of 1938, to interfere in any way with the wage structure of the bituminous coal

industry. A statement made by Major Percy Tetlow, an official of the International Union, United Mine Workers of America, who testified in this case, seems to bear out this conclusion. He said:

"No, the miners' organization has always taken the position that the question of wages, hours and conditions of employment should be governed and controlled by agreements under collective bargaining in the industry more so than by legislation. We have always taken the position that any legislation which will improve standards of working men and women,—to favor it and foster it and support it. Fundamentally, we are opposed to legislation that controls the daily wage and conditions of employment. We think that is a relationship that should exist between employer and employee."

The Administrative Ruling.

The fact that the precise question here presented has been investigated and ruled upon by the governmental administrative agency charged with the enforcement of the Act, seems to me to be of paramount importance.

The evidence in this case shows beyond question that in July 1940 the Administrator of the Wage and Hour Division, Department of Labor, ruled that travel time of underground workers in the bituminous coal industry was not work time within the purview of the Fair Labor Standards Act. There is no suggestion that there has been any modification of this ruling. The Administrator was invited by plaintiff to intervene in this action, of which invitation he must have been aware, as his Regional Attorney was present in court throughout the trial and also attended the pretrial conference. I must therefore assume that the Administrator did not wish to retract or modify his ruling of July 1940.

Of course, an administrative ruling does not have the force of law. In one instance, where I was satisfied that an administrative ruling was plainly wrong, I declined

to follow it. *Magam* v. *Long's Baggage Transfer Co.*, D. C., 39 F. Supp. 742. However, as to such rulings, the Supreme Court has said:

"In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involved 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.' " *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549, 60 S. Ct. 1059, 1067, 84 L. Ed. 1345.

"* * * it has been the settled law that, when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and carry its provisions into effect * * *." *National Lead Co.* v. *United States*, 252 U. S. 140, 145, 40 S. Ct. 237, 239, 64 L. Ed. 496.

See also *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796; *Securities and Exchange Commission* v. *Associated Gas & Electric Co.*, 2 Cir., 99 F. 2d 795, 798; *Butte Miners' Union* v. *Anaconda Copper Mining Co.*, 112 Mont. 418, 118 P. 2d 148.

Consequently, I have generally followed such rulings. *Reliance Storage & Inspection Co., Inc.*, v. *Hubbard*, D. C., 50 F. Supp. 1012, 1014.

It seems to me that this particular administrative ruling is entitled to even more than the "great weight" to which the Supreme Court said such rulings were entitled generally, by reason of the thoroughness with which the Administrator went into the question before making his ruling. It appears from the evidence that the question first came to the attention of the coal operators through what was probably a routine investigation of the operating practices of the Monroe Coal Mining Corporation in Pennsylvania, made by a representative of the Wage and Hour Division to determine whether or not this company was complying

with the Act. After a thorough investigation, this investigator reported that in his opinion, travel time in the bituminous coal industry should not be considered as work time, but that, as travel time had been counted as work time in metal mining in the consent decree entered in the *Cornucopia Gold Mining case*, possibly it would be necessary to count travel time as work time in the bituminous coal mining industry. Upon learning of this situation, high officials of the coal operators association took the matter up with the president and high officials of the United Mine Workers of America, who all agreed, apparently without dissent, that the Act did not require the inclusion of travel time as work time, and that the Administrator should so rule. Representatives of the operators and of the Union expressed this view to various representatives of the Wage and Hour Division, and finally to the Administrator, Colonel Fleming himself. Colonel Fleming "indicated that if in this long period of collective bargaining in the mining industry that that (the face-to-face basis) was the basis upon which payment for work was agreed upon, that there wasn't any reason why he should wish to disturb it. He said that he felt that a bona fide arrangement of that kind of history of fifty years, certainly ought not to be disturbed, particularly after the description we had given him of the disturbance that would be occasioned in the industry by any such revolutionary change in its wage structure." However, Colonel Fleming did not then make a ruling, but referred the representatives of the operators and the Union to the Regional Director of the Office of the Wage and Hour Division in Philadelphia and his attorney. After conferring with these officials, the representatives of the coal operators and the Union wrote and delivered the letter of July 9, 1940, quoted from in my findings of fact, and which is generally referred to as the "Houck letter". Then, after receiving a report of this conference, Colonel Fleming made and announced the administrative ruling that in the bituminous coal industry, the Fair Labor Standards Act did not require the inclusion of travel time of underground workers as work time.

I do not find anything in this record which satisfies me that this ruling was plainly wrong; in fact, I find nothing which casts doubt upon its correctness. Giving to it the "great weight" to which the Supreme Court has said it is entitled, it is my conclusion to follow and sustain this ruling.

Case of *Tennessee &c.* v. *Muscoda &c.*

Defendants principally rely upon the case of *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al.*, D. C., 40 F. Supp. 4; Id., 5 Cir., 135 F. 2d 320, and on rehearing, 5 Cir., 137 F. 2d 176. This also was a declaratory judgment action, for the determination of what constituted the work week of underground iron ore miners under the provisions of the Fair Labor Standards Act of 1938. The District Court considered separately whether—

(1) The time spent on the surface in obtaining and returning tools and equipment,

(2) travel time from the portal to and from the usual places of work, and

(3) the lunch period,—

constituted working time within the meaning of the Act, and concluded that (1) the time spent on the surface in obtaining and returning tools and equipment, and (2) travel time from the portal to and from the usual places of work, must, under the Act, be included in the employee's work week, and that (3), the lunch period, did not constitute working time and need not be included in the work week.

On appeal, the Circuit Court (one judge dissenting) affirmed as to (2) and (3), but reversed as to (1).

At the outset, it is interesting to note that the majority of the Circuit Court, especially in the opinion on rehearing, strictly confine their holding to the particular circumstances of that instant case, and that the majority holding was merely a refusal, "because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances." 137 F. 2d at page 183. The Court said (137 F. 2d at page 183):

"In a supplemental brief, one of the appellants says that the effect of our decision, the plain and definite holding of the majority, is that as a matter of law the time consumed in traveling from the portal of the mine to the face and in returning therefrom to the portal 'must be included in the working time that makes up the work-week of every ore-mining employee within the meaning of Section 7 of the Fair Labor Standards Act'. We did not so hold, and such should not be the effect of our decision.

"We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as a matter of law, or as denying the principle that *in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually affected.* The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal. We have expounded no rigid definition of working time.

"The Act fails to provide one, and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely, 'because the employment relationships to which the Act would apply were so various and unpredictable'.

"Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We do not do either; *we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances.* The Act of Congress in this respect differs from the legislation of those mining states that limit work-time in underground mines to eight hours per day, and that include in this reckoning all time spent underground." (Italics mine.)

Defendants do not here contend that lunch time is working time. They do contend that working time for the underground employees begins as soon as they are required to and do report at the portal, and continues until they return to the portal at the end of the shift, thus including all the time spent in obtaining lamps, tools or equipment, and other preparatory activities, as well as travel time.

As to the time spent in preparatory activities, estimated to consume here from three to ten minutes, I agreed with the majority holding in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra*, which is there set out as follows at page 323 of 135 F. 2d:

"With respect to time spent by employees checking in and out and procuring and returning tools, lamps, and carbide, the case stands differently. It appears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the tally house when arriving for work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time, since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment."

As to travel time, I do not agree that the majority holding in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra*, should be applied here, as contended by counsel for defendants. In the first place, the weight of the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra*, is considerably lessened by strong dissent of Sibley, Senior Circuit Judge, in which, in part, he said:

"The Act does not define 'work time' or even 'work'. It may apply to each and every industry. What would be work in one industry may not be in another. It seems to me that a man is at work, for the purposes of the Act, when he is doing what he is hired to do. It may involve mental or physical effort, or it may consist in simple presence. It all depends on the contract of hiring. The Act did not intend to upset and nullify the wage contracts of force in the various industries. It simply fixed minimum wages for work done under them, and maximum hours. Of course contracts yield to the Act on these points, but they still control as to the work to be done, and the way it is to be done, and as to the scale of pay if not less than the minimum fixed by the Act. These things are left to bargaining, and especially to collective bargaining under the principles of the National Labor Relations Act, 29 U. S. C. A., § 151 *et seq.*

"No question is older in such bargaining than the question whether 'travel time' is to be included in 'work time'. The worker has always thought he ought not to lose all of the time necessary to go to and from his place of work; the employer has thought he ought not to pay for time that produces no work results. The dispute has been resolved in various ways in employment contracts for pay estimated by the hour. Plumbers demand and get pay from the time they leave their places of business to go to a job until they return. Railroad trainmen get pay from the time they report for duty, no matter what delay may occur in the starting of the train. Railway trackmen also are paid from the hour of their assembly at the section point, though they may ride their motor car for miles before doing any track work. On the other hand carpenters, masons, and most artisans and laborers are paid for work only after they take up their tools on the job. As to coal and iron ore miners, traditionally they have been paid according to production, but their modern contracts have always included an express agreement as to their work time, and that agreement has excluded from work time the travel time in reach-

ing the coal seam or ore bed, which were agreed to be the place of work. This is true of the collective bargains made by strong unions throughout the Appalachian region, as it is true of the bargains under which the miners in this case have worked. Their work time is agreed to be that spent at the ore bed. The employers' arrangement to get them to that place reliably and safely is primarily for the benefit of the miner and is not work for the employer, according to these agreements. The discomforts and dangers of the trip, as well as the loss of time, are all considered in fixing the rate of pay for the work of extracting the ore, and the pay scales here involved are far above the minimum fixed by the Act. The miner's work is hard and dangerous, but his pay is supposed to compensate for all this. If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in *futuro*, and not by unexpected penalty, as here.

"There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act."

However, conceding the correctness of the decision of the majority in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case*, it seems to me that this decision is clearly distinguishable from the instant case and

not in point here. In deciding the issue as to travel time, the District Court in its conclusions, and the Circuit Court on appeal, relied upon certain controlling considerations.

First, there it appeared that the Administrator of the Wage and Hour Division, United States Department of Labor, had recently ruled that in the metal mining industry, travel time was work time, and furthermore, the Administrator there intervened and made substantially the same contentions as did the several defendants. Here, the situation is precisely the converse. In July, 1940, the Administrator announced his ruling that in the bituminous coal industry, travel time was not necessarily work time under the Act, and there has been no subsequent modification of this ruling. And as has been heretofore mentioned, although plaintiff in its complaint asserted that the Administrator was interested in the construction and application of the Act and invited his timely intervention in this action, the Administrator has neither sought to intervene nor appear as an *amicus curiae*, although his Regional Attorney was in attendance throughout.

Second, there it did not appear to the satisfaction of the court that by established usage throughout the industry, travel time was uniformly excluded from the work-week. It does appear here, beyond any question, that travel time has never been considered as, or included in, work time by anyone in the bituminous coal industry in this country. On the contrary, for certainly the past fifty years, the "face to face" basis has been universally recognized in the bituminous coal industry as the basis for computation of work time.

Third, there, the court concluded that although it be conceded that recent wage contracts did exclude travel time from the work week, such contracts were not free and uncoerced agreements on the part of the mine workers, but reflected the dictation of the employers and the inability of the employees and their union to obtain recognition of their right, as repeatedly asserted and contended for, to be paid

for their underground travel time. Here, we have the word of both the operators and the Union that as to the "face to face" basis, "This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years, and is the result of collective bargaining in its complete sense." On this point, an excerpt from the brief of counsel for the iron miners in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case,* on appeal, is quite interesting (p. 59):

"We are not trying the case of coal miners. We are not experts on coal mining. We do know that there are two great differences between the coal mining situation and the mining of iron ore in Jefferson County. *In coal mining we find a union which has been strong and powerful and which as a union has been engaged in collective bargaining with the coal operators over a long period of years. In our case we find the efforts of the men to organize their union presents a pitiable picture of helplessness against the domination of the mining companies.* In coal mining the men work seven hours per day. At no point in the voluminous record created by the appellants do we find a single ore mining company offering to pay its men on a seven hour day." (Italics mine.)

The record in this case by no means discloses "a pitiable picture of helplessness against the domination of the mining companies". On the contrary, the record here does disclose the picture of the "strong and powerful" union mentioned by counsel, which is able and willing, when it feels aggrieved, even in time of war, to paralyze the production of bituminous coal in this country by a strike, or, in the euphemistic language of its members, "a work stoppage while awaiting a contract". It is hardly likely that such an union has been coerced by the coal operators into waiving any valuable monetary right to which its members were entitled by law.

Fourth, there the court found that the underground travel was under conditions peculiar to the mining of iron ore which were replete with hazards, highly uncomfortable and requiring physical exertion, due largely to overcrowding of cars, and which were unpleasant and disagreeable because of bad odors, heat and poor ventilation, and were burdensome to those encountering them. Here, although I have not found that the "man-trips" constituted pleasure excursions, I have found no such painful and burdensome conditions as those described in the iron ore mines.

For the reasons set out above, it appears to me that the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case* is clearly distinguishable from the instant case, and should not govern, conceding that the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case* was correctly decided by the majority.

Other cases involving the question of travel time in other industries under various circumstances and in the light of various statutes have been cited and discussed by counsel for both sides. It does not seem to me that they are sufficiently pertinent to the particular situation here presented, to warrant a discussion of them herein.

Contemporaneous Construction and Agreements by the Parties.

The proposition, that contracts made in violation of the Fair Labor Standards Act, or any other valid Act of Congress, are ineffective as against the Act, is too plain to require the citation of authority. And it is equally true that custom and usage, no matter of what long standing, cannot prevail against an Act of Congress. As well stated by counsel for defendants here, acts of Congress are frequently designed to change customs and usages which are deemed unfair, harsh and oppressive. Nor can contemporaneous understandings or constructions of the act by the interested parties alter its plain terms.

However, in this case, the plain terms of the Act do not cover the precise situation here presented. The question of when travel time is work time, and when it is not, is a question which may require a diversity of answers in diverse situations, as pointed out by Judge Sibley in the *Tennessee Coal, Iron & R. Co. et al.* v. *Muscoda Local No. 123 et al. case, supra,* 135 F. 2d at page 323 thereof. It is quite true, as urged by defendants' counsel, that that which is plain requires no interpretation and presents no occasion for the use of extrinsic aids to its construction, but I cannot agree with their contention that the plain language of the Fair Labor Standards Act requires inclusion of travel time as work time. It seems to me that the language of the Act relied upon by defendants *quoad* travel time falls far short of sustaining their contention in plain terms. In such a situation, it seems to me some of the very cases cited and relied upon by defendants' counsel recognize the principle that extrinsic aid should be sought.

"Long-continued practice and the approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, but cannot alter provisions that are clear and explicit when related to the facts disclosed." *Louisville & N., etc., Co.* v. *United States,* 282 U. S. 740, 759, 51 S. Ct. 297, 304, 75 L. Ed. 672.

"The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it." *Hamilton* v. *Rathbone,* 175 U. S. 414, 419, 20 S. Ct. 155, 157, 44 L. Ed. 219.

In this case, more than 400 employees travel from their homes to the mines in trucks and buses operated by the

company. If they are entitled to pay for the time spent in traveling from the portal of the mine to their usual places of work, might it not also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines? If "surrender of freedom of action" be any criterion, as contended by defendants' counsel, do not these employees surrender their "freedom of action" when they become passengers on plaintiff's vehicles?

It does therefore seem important to inquire into the customs and usages of the industry, the contracts and agreements made between the parties, and the contemporaneous construction placed upon the Act by the interested parties. The evidence shows beyond question that, in the bituminous coal industry in this country, for the past fifty years, travel time of underground workers has not been considered work time. By the NIRA Code for the bituminous coal industry, travel time was definitely excluded from work time. By the precise terms of all subsequent contracts between plaintiff and defendants, and between employers and employees generally in the bituminous coal industry, travel time has been excluded from work time.

But the defendants contend that the last contract expired March 31, 1943, and that thereafter, in the absence of contract, the Fair Labor Standards Act applied, and that by virtue thereof travel time became work time. Defendants, by an amended answer, have disclaimed any compensation for overtime prior to April 1, 1943. Plaintiff contends that the contract, which by its terms was to expire March 31, 1943, was continued in force by the parties pursuant to directives of governmental agencies. Certainly, the parties continued to operate under the contract of April 1, 1943, to the time of the institution of this action. However, it seems to me that the question of whether or not this contract was continued in force and remained binding upon the parties during this period is neither important nor material. If the Fair Labor Standards Act, from its effective

date, required the inclusion of travel time as work time, it did so irrespective of contract, and if there was a contract to the contrary, the contract would be ineffective as against the Act.

What does seem to me important and controlling is that by the universal custom and usage of the past fifty years, and by agreement of the parties in every collective bargaining agreement which was ever made, it was universally recognized that in the bituminous coal industry, travel time was not work time. And this is the condition which prevailed when the Fair Labor Standards Act was enacted in 1938, and of which it must be presumed Congress was aware.

"It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity." *United States* v. *Turner Turpentine Co.*, 5 Cir., 111 F. 2d 400, 404.

"Usages long established and followed have, to a great extent, the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments." *Slidell* v. *Grandjean*, 111 U. S. 412, 421, 4 S. Ct. 475, 478, 28 L. Ed. 321.

The contemporaneous construction of the Act by the interested parties in the bituminous coal industry could not possibly appear more clearly nor fully than as set out in the letter of July 9, 1940, written to the Administrator by responsible representatives of the coal operators and the United Mine Workers jointly, and usually referred to as the "Houck letter". In this letter, not only is there no suggestion that by the terms of the Fair Labor Standards Act, travel time must be included in working time; on the contrary, it is positively asserted that any change from the traditional "face to face" basis would "result in complete chaos, and would probably result in a complete stoppage of work at practically all the coal mines in the United

States"; and "moreover", that "the very purpose of the Fair Labor Standards Act would be defeated" by such a change.

This entire letter is so illuminating that I append it in extenso as a footnote hereto.[1]

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[1]

1617 Pennsylvania Boulevard
Philadelphia, Pennsylvania
July 9, 1940

Col. Philip B. Fleming, Administrator,
Wage and Hour Division,
Department of Labor,
Washington, D. C.

Dear Mr. Administrator:

As a result of certain investigations which have been conducted by the Wage & Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association, concerning the application of the Fair Labor Standards Act to the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter, of the Southern Appalachian Coal Operators' Association, Knoxville, Tenn.; Charles O'Neill, President of the United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice President of Monroe Coal Mining Company; Frederick H. Knight, counsel for Monroe Coal Mining Company; W. L. Robison, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and M. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the question of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage & Hour Division as to the provisions of the Appalachian Wage Agreement covering maxi-

Presumably Congress refrained from attempting such a definition because the employment relationships to which the Acts would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. *When employer and employees have*

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mum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis * * *." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Maryland. In this territory there are several thousand rail shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement covering its own territory, subject, however, to the provision that it must include within it all of the provisions of the Appalachian Agreement. The mines in the Appalachian region produce 70% of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as the basic agreement upon which the district agreements of the remaining 30% of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In those conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside day rate in the North is $.857 per hour, and in the South it is $.80 per hour. The underground workers are paid on this basis with maximum rates for mobile loading machine operators, approximately $1.09 per hour. In addition, the agreement provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for it at the rate of time and one-half * * *." It is our opinion that these sub-

*agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text * * *." Walling* v. *A. H. Belo, etc.*, 316

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stantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places are, of course, close by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places. Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for a certain tolerance. In any event, the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual

U. S. 624, 634, 62 S. Ct. 1223, 1229, 86 L. Ed. 1716. (Italics mine.)

Conclusions.

For the reasons set out above, my conclusions of law are:

(1) That the Fair Labor Standards Act of 1938 does not require that there be included within the work week of

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working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition, and contract provision so as to change the work day from "seven hours' work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that could paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian Agreement (which embodies the custom and traditions of the bituminous mining industry), as complying both with the provisions of the Fair

underground workers in plaintiff's mines, either time spent by such employees outside the portal of the mines before entering therein, or time spent in traveling from the portals to their usual places of work and return.

(2) That plaintiff, in computing the work week of its underground employees on the basis of hours of work in the mines at their usual working places, exclusive of the lunch period, and the time spent outside the portals and travel time from the portals to their usual working places and return, as provided in the effective wage agreements and continuations thereof, and in paying its underground workers for their services on that basis, has complied with and discharged all its obligations imposed upon it by the Fair Labor Standards Act of 1938.

An order will be entered declaring the rights of the parties in accordance with the above conclusions, and dismissing this action at the costs of the defendants.

Labor Standards Act and of Interpretive Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purposes of the Act."

We therefore respectfully request that your Division issue a supplement to Interpretive Bulletin No. 13, stating that the standard of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1940, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the several district agreements based thereon, conform to and satisfy the requirements of the Wage & Hour Act.

Respectfully submitted,

For the United Mine Workers of America:
s. EARL E. HOUCK,
Director of the Legal Department.

For the Operators:
s. W. L. ROBISON, Chairman,
s. CHARLES O'NEILL,
s. L. T. PUTNAM,
s. L. C. GUNTER,
s. J. D. A. MORROW,
Appalachian Joint Conference Negotiating Committee.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 5246.

Local No. 6167, United Mine Workers of America, an unincorporated association, affiliated with the International Union, United Mine Workers of America, et al., *Appellants*,

v.

Jewell Ridge Coal Corporation, a Corporation, *Appellee*.

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke.

(Argued June 28, 1944. Decided October 6, 1944.)

Before Parker, Soper and Dobie, Circuit Judges.

Crampton Harris (Welly K. Hopkins, Frank W. Rogers and Leonard G. Muse on brief) for Appellants; George Richardson, Jr., and William A. Stuart (Penn, Stuart & Phillips, and Richardson & Kemper on brief) for Appellee; and John C. Gall (E. R. Burke on brief) for Southern Coal Producers Association, as amicus curiae.

Parker, Circuit Judge:

This is an appeal in a suit instituted to obtain a declaratory judgment to the effect that the Fair Labor Standards

Act of 1938 does not require that "travel time" from "portal to portal" be included in the "work week" of miners in bituminous coal mines. Plaintiff is the owner and operator of two mines in western Virginia employing around 900 miners. It brought a class action against two local unions of the United Mine Workers of America and certain of their officers and members. An answer filed on behalf of the defendants denied plaintiff's right to the relief asked and by way of counterclaim asked recovery under the Fair Labor Standards Act for additional wages for work done between April 1, 1943 and June 20, 1943. The District Court rendered judgment for plaintiff and the defendants have appealed. The facts are fully stated in the opinion of the District Court. *Jewell Ridge Coal Corporation* v. *Local No. 6167, etc.*, 53 F. Supp. 935.

In view of the long established custom in the coal industry not to include travel time in the work week, the collective bargaining contracts extending over a long period recognizing the "face to face" basis of pay, the testimony before the committees of Congress, the reason and purpose of the Fair Labor Standards Act and the probable effects and consequences of construing the act to require travel time in bituminous coal mines to be included in the work week, there is strong reason for thinking, as everyone connected with the matter seems to have thought until recently, that it was not the intent of Congress that the act should be so construed in its application to the coal mining industry. The reasons in support of this conclusion are fully and ably set forth in the opinion of the learned judge below and need not be repeated. They would be convincing, were it not for the decision of the Supreme Court in *Tennessee Coal Iron & R. Co.* v. *Muscoda Local No. 123 etc.*, — U. S. —, 64 S. Ct. 698, which we do not think can be distinguished in principle from the case at bar.

A distinction is attempted on the ground that the travel time involved in the *Muscoda case* involved travel in an iron mine and the trial judge had found that it was properly in-

cluded in the work week, whereas the travel time here involved is in a coal mine and the trial judge has found it not properly included. This, however, is a distinction without a difference. The record leaves no doubt that travel to the working face in a coal mine is substantially the same sort of thing as travel to the working face in an iron mine; and, while the Supreme Court in the case before it made reference to the findings below, it is clear from the opinion that, irrespective of the findings, the court was of opinion that travel of the sort here involved should be considered work within the meaning of the statute and included within the work week. The court said in this connection:

> "We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner. Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. It is vital, of course, to determine first the extent of the actual work week. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used—as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.
>
> "Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the under-

ground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.

"Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines. Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations. The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus essential to petitioners' production. It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3(j) of the Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron Ore miners traveling underground are no less engaged in a 'process or occupation' necessary to actual production. They do more than 'stand and wait'. *Missouri, K. & T. R. Co.* v. *United States*, 231 U. S. 112, 119, 34 S. Ct. 26, 27, 58 L. Ed. 144, Cf. *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158, 48 S. Ct. 221, 222, 72 L. Ed. 507, 66 A.L.R. 1402. Theirs is a fossorial activity bearing all the indicia of hard labor."

That the decision of the Court was understood by the Court itself to be based upon the underlying facts of the

case and not merely upon the interpretation which the lower courts had placed upon those facts, is shown by the concurring opinions, which stressed the interpretation made in the findings of the lower courts. If the interpretation of the facts in these findings had been the controlling consideration in the majority opinion, there would, of course, have been no occasion whatever for the concurring opinions. Furthermore, where the facts of two cases are substantially the same, the law should not be applied differently because trial judges have looked at them in a different way. The record shows that travel in an iron mine is the same sort of thing as travel in a coal mine. The findings of the trial courts as to whether upon the basic facts travel time was part of the work week within the meaning of the statute were mere conclusions involving mixed questions of law and fact; and, the basic facts being the same, an appellate court cannot distinguish cases on the basis of such conclusions. In such case, the difference in conclusions involving mixed questions of law and fact is necessarily attributable to a difference in views as to the law or its application.

Equally vain is the attempt to distinguish the Supreme Court's decision on the ground that no such custom or bargaining agreements existed in the case of the mining of ore as are shown in the case before us. The Supreme Court decided the point on two grounds: (1) that the custom and agreements relied on were not sufficiently shown, and (2) that they were immaterial in any event. After commenting on the failure of the lower court to find "immemorial" custom or collective bargaining agreements and saying that the lower court's findings with regard thereto were not so clearly erroneous as to require that they be disregarded, the Supreme Court went on to say:

> "But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or

not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be untilized to deprive employees of their statutory rights."

And in a note to the passage above quoted, the Court said:

"Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in Section 7(b) (1) and (2) of the Act. Cf. Section 8(c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts."

What the majority of the court has thus so clearly said we are not at liberty to ignore. It is no answer that the case might have been decided on the ground that the evidence as to custom and contract was insufficient. The court chose to place its decision on the additional ground that custom and contract were immaterial; and it is settled beyond controversy that in such case the decision is binding authority as to both of the grounds upon which it is based. *Richmond Screw Anchor Co.* v. *United States*, 275 U. S. 331, 340; *United States* v. *Title Ins. Co.*, 265 U. S., 472, 486; *Union Pac. R. Co.* v. *Mason City Co.*, 199 U. S. 160, 166; 14 Am. Jur. 298.

Nor is anything said in the concluding paragraph of the Supreme Court's opinion upon which a distinction can be

based. This is not a case "where precisely accurate computation is difficult or impossible", nor is it one of the "borderline cases where the other facts give rise to serious doubts as to whether certain activity or non activity constitutes work or employment". Cf. dissenting opinion of Judge Sibley in the *Muscoda case*, 135 F. 2d at 323. What is involved is just the sort of activity as was held by the Supreme Court to "leave no uncertainty" as to its character as "work".

Under the circumstances, there is nothing for us to do but reverse the decision below. If it is thought that the decision of the Supreme Court should be overruled or limited so as not to apply to a case of this character, that is a matter for the Supreme Court and not for us.

The disturbing effect of the decision here will not be so great as it otherwise would, in view of the fact that, by agreement between the miners and operators, the portal to portal system of computing the work week has now been adopted in the industry. An amended answer filed in the cause waives the right to additional wages due under the act prior to April 1, 1943, the date of the expiration of the contract between the union and the operators; and the amount claimed as additional wages between April 1st and June 20th, 1943, is only the amount voluntarily awarded the workers in other mines as a result of the settlement arrived at when the "portal to portal" basis was adopted. The mines of plaintiff were excluded from the terms of that settlement, as we understand, so that the right to an adjudication of the questions here involved would not be affected.

For the reasons stated, the judgment appealed from will be reversed and the cause will be remanded for further proceedings not inconsistent herewith.

Reversed.

SOPER, CIRCUIT JUDGE, dissenting:

If certain statements in the opinion in *Tennessee Coal Co. v. Muscoda Local*, 321 U. S. 590 are viewed apart from their setting, a reversal of the judgment in the pending case in favor of the mine operators may perhaps be logically deduced; but a reversal will produce a result so inequitable that we may well inquire whether we should not discard formality and adopt a realistic attitude in resolving the issue, as we are admonished to do in cases of this sort in the opening sentences of that opinion.

In the pending coal mine case, unlike the *Tennessee case* where conditions in iron ore mines were under consideration, it was found by the District Court upon undisputed evidence that "by the universal custom and usage of the past fifty years and by agreement of the parties in every collective bargaining agreement that was ever made, it was universally recognized that in the bituminous coal industry travel time was not work time". In short, the court found that in the coal mining industry the term "workweek" had come to have the definite meaning of time spent at work at the face of the mine exclusive of travel time; and from this finding the conclusion naturally followed that the term should be given this significance in the application of a statute which does not define the term at all.

This conclusion is now said to be erroneous because in the later decision in the Tennessee case, where the District Court had failed to find any such immemorial custom or collective bargaining agreements, the Supreme Court said (p. 602), that "in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the work week." While this language was used with respect to the different conditions then prevailing in the metal mining industry, it is now taken to mean that custom or contract, no matter how long or how firmly established, must be disregarded in fixing the limits of the work week in all industries.

This line of reasoning produces such an injustice in the pending case that I am loath to believe that it represents a correct interpretation of the statute or the conclusion which the Supreme Court itself would reach if the pending case were before it. In this case we do not have the picture portrayed in the opinions in the earlier suit of miners struggling against difficulties to obtain the best terms they could get and making repeated unsuccessful attempts to be paid in whole or in part for travel time, where in short travel time was not excluded from work time with the miners' free and uncoerced consent, and the District Court consequently found that there was no custom so well established that Congress must have adopted it or had it in mind when it used the term "workweek" in the statute, nor do we have such a decision as that rendered by the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941 in respect to the metal mining industry that work time starts when the miner reports for duty at the collar of the mine and ends when he reaches the collar at the end of the shift. See 40 F. Supp. 7, 8, 10; 135 F. 2d 322, 323, and 321 U. S. 601.

Quite the contrary has been the situation in the coal mining industry. Not only was there a custom of fifty years' standing, repeatedly embodied in successive collective bargaining agreements, but the custom had the affirmative approval of the powerful union known as the United Mine Workers of America which had been eminently successful in representing the miners' interests. The "face to face" basis for the computation of working time has been traditional in the industry. When the Code of Fair Competition under the National Industrial Recovery Act was drawn up for the industry by representatives of the operators and of the United Mine Workers and approved by the President of the United States in 1933, it provided that the work day should consist of seven hours' work at the face of the mine. Basic wage agreements for the industry executed

by the operators and by the union in 1934, 1935 and 1937 incorporated this provision. Even after the Fair Labor Standards Act passed on June 25, 1938 had become effective in accordance with its terms on October 23, 1938, the same provision was retained in the basic agreement of May 12, 1939 for the period of two years; and it was repeated in a succeeding two year agreement executed on April 1, 1941.

It must not be supposed that this method of computing wages was imposed upon an unwilling union by the superior power of management. It was deemed by both parties to be beneficial to their respective interests as a practical solution of the perplexing questions which would otherwise arise in applying a general wage agreement to a large number of mines in which the travel time necessarily varied on account of diverse physical conditions. This was strikingly shown in 1940 in the course of an investigation of the industry by the Office of Wage and Hour Administration when the representatives of the operators and the representatives of the union on July 9, 1940 united in a letter urging the administration to recognize the traditional contract provision as conforming to the statute. They pointed out that the wage agreements in effect afforded "the highest standards of labor provided in any industry in the United States both as to hours of working time and wages paid"; and they expressed the opinion that the adoption of the "portal to portal" system "would create so much confusion in the bituminous coal industry as to result in complete chaos". The administration acceded to this view and on July 18, 1940 gave out the opinion that "the practice of computing working time on a face to face basis in the bituminous coal industry would not be unreasonable". It was under this state of affairs that the two year agreement of April 1, 1941 was executed.

It was not until March, 1943, during the negotiations for a new contract to take effect April 1, 1943, that the union suggested that in order to conform with the basic and legal

requirements for the industry the maximum hours and working time provisions of the contract should be so phrased as to establish portal to portal for starting and quitting time for all underground workers. But even then it was obvious that the portal to portal basis was proposed in order to justify a flat $2 a day wage increase for all workers because the increase was demanded for all classifications of outside as well as inside day men.

The negotiations were not successful although prolonged conferences were held in an effort to reach an agreement and the dispute was referred to the War Labor Board. There were strikes which resulted in the seizure of the mines by the federal government and intermittent work periods during which the industry operated under the conditions specified in the 1941 agreement. Finally the Secretary of the Interior, representing the government, and John L. Lewis, representing the miners, reached an agreement on November 3, 1943 which included the portal to portal method of measuring work time. Subsequently the greater part of the industry yielded and entered into agreements on the lines of the Ickes-Lewis agreement.

This change of front on the part of the miners for bargaining purposes, when making an agreement for future operations, could not affect the condition which formerly existed in the industry or transform into work time that which was not work time in the generally accepted meaning of the term that had prevailed in the industry for a long time when the statute was passed and that continued to prevail with administrative sanction for five years after its enactment. The statute could not have one meaning in the earlier and another meaning in the later period; and the Mining Company was justified in resisting in this suit the application of the portal to portal method of computation for work done by the miners even after the 1941 agreement had expired.

It seems a mistake to suppose that under no circumstances can custom or agreement throw any light on the meaning of the Act in its bearing upon an industry. The

language of the Supreme Court in the Tennessee case should not be given this sweeping significance as the decisions of the courts tend to show. For example, it was held in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572, that in the statutory sense the regular rate of pay for any particular week is the quotient of the amount paid per week divided by the number of hours worked in that week, and that overtime must be calculated on this basis, and unless this is done, it is not sufficient that the wages actually paid exceed the statutory minimum; but, on the other hand, it was held in *Walling* v. *Belo Corp.*, 316 U. S. 624, that an employer could continue to pay his employees the same weekly salaries without violating the Act because he rearranged the basis of compensation by an agreement which provided for a basic rate of pay per hour for the maximum hours fixed by the Act and one and a half times that rate per hour for overtime together with a guarantee that the employee should receive each week for regular time and overtime not less that a stipulated amount. In view of these decisions, it is obvious that the legality of rate of pay may depend upon an agreement of the parties.

It is suggested in mitigation of the harsh effect of a decision adverse to the Mining Company that the amount claimed by the miners in this case has been limited, by amendment of the counterclaim, to the period beginning April 1, 1943 and ending June 20, 1943. Indeed it is assumed in the briefs that each miner's claim is limited to the sum of $40 and that the total sum involved is approximately $40,000. These statements cannot be verified in the record. The amendment to the counterclaim is not limited to the period ending June 20, 1943 but contains merely the assertion that the miners will not further assert their claims to travel time prior to March 31, 1943. The end of the period for which the claim is made is not stated; nor is the amount of the claim defined. The assumed limitation of the period to June 20, 1943 and to the sum of $40 per miner seems to be based on the terms of agreements entered into between the union and other mining corpora-

tions; but so far as the record discloses, the Jewell Ridge Coal Corporation has never entered into a new agreement or paid for travel time. If a claim is asserted for the full amount due under the Act, as now interpreted by the miners, a very much larger sum than $40,000 will be involved in this controversy.

Moreover, the decision may be of grave importance in its application to other mine owners who have not dealt with the union or have not signed wage agreements. If the new interpretation of work time is applied to them over the period that has elapsed since the passage of the Act, subject only to local statutes of limitations, and double payment is exacted under the penal sections of the Act, it may be that the mine owners will be subject to losses of huge amounts. Indeed the decision might prove even more sweeping in its effect for it might invalidate the compromise provisions respecting pay for travel time and liquidated damages that form part of contracts between the mine owners and the union in a large part of the industry. If portal to portal pay is required under the Act as a matter of law, such settlements are not binding if the amount paid is less than the actual wages due under the Act; and the mine owners would become liable not only to make up the deficiency but to pay an equal amount in addition as liquidated damages. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572. See also, *Guess* v. *Montague*, 4 Cir., 140 F. 2d 500; *Fleming* v. *Warshawsky & Co.*, 7 Cir., 123 F. 2d 622; *Johnson* v. *Dierks Lumber & Coal Co.*, 8 Cir., 130 F. 2d 115; *Rigopoulon* v. *Kervan*, 2 Cir., 140 F. 2d 506; *Birbalas* v. *Cuneo Printing Industries, Inc.*, 7 Cir., 140 F. 2d 826.

These considerations give force to the conclusion that Congress could not have intended to compel mine owners to pay large increases in wages over and above those specified in prevailing agreements, and also to inflict upon the mine owners additional sums in the nature of a penalty by giving to the term "work week", as used in the statute, a significance contrary to that which by voluntary agreement and by long continued custom had prevailed in the industry.

TENNESSEE COAL, IRON & R. CO.

v.

MUSCODA LOCAL NO. 123 ET AL. (FLEMING, *Intervener*).

SLOSS-SHEFFIELD STEEL & IRON CO.

v.

SLOSS RED ORE LOCAL NO. 109 ET AL. (FLEMING (*Intervener*).

REPUBLIC STEEL CORPORATION

v.

RAIMUND LOCAL NO. 121 ET AL. (FLEMING, (*Intervener*).

Civil Actions Nos. 5232-5234.

District Court, N. D. Alabama, S. D.

Aug. 13, 1941.

Action by the Tennessee Coal, Iron & Railroad Company against Muscoda Local No. 123 and others, wherein Philip B. Fleming, administrator, etc., intervened, consolidated with actions by the Sloss-Sheffield Steel & Iron Company against Sloss Red Ore Local No. 109 and others, wherein Philip B. Fleming, administrator, etc., intervened, and by the Republic Steel Corporation against Raimund Local No. 121 and others, wherein Philip B. Fleming, administrator, etc., intervened, for declaratory judgments, wherein the defendants filed counterclaims against the plaintiffs.

Judgment in accordance with opinion.

MURPHREE, District Judge.

These cases, which were consolidated for trial, are actions for declaratory judgments. The plaintiffs are three corporations engaged, *inter alia*, in mining iron ore; they contend that the workweek of their underground ore mining employees does not include, within the meaning of Section 7 of the Fair Labor Standards Act of 1938, Title 29, U. S. C.

A., § 207, that portion of the time spent by those employees in being transported and in walking to and from their usual working places. The defendants are labor unions, labor union officials, and individuals, who are representative of the general class of underground ore mining employees of the several plaintiffs. The defendants contend that the workweek of these employees includes all of the periods between the times when the miner reports for duty as required at or near the collar of the mine and when he reaches the collar at the end of the shift, except any fixed lunch period during which the miner is relieved of all duties, and also includes the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out. Because many persons in the class of the defendants are making actual claims upon the several plaintiffs for overtime compensation, based on the contention made by defendants in these actions, a justiciable controversy is presented.

The Administrator of the Wage and Hour Division of the United States Department of Labor has been permitted to intervene in each action, and he has made herein substantially the same contentions as have the several defendants.

The question presented is one of construction and application of the Fair Labor Standards Act of 1938 (hereinafter referred to as the Act). The important portion of Section 7 of the Act is:

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

By the provisions of Section 3(g) of the Act, Title 29, U. S. C. A. § 203(g), "employ" is defined to include "to suffer or permit to work".

The plaintiffs, in order to prove their contended construction and application, adduced evidence of two kinds: (1) Evidence of an alleged custom or usage, with respect to the issues here presented, of a kind that the plaintiffs contend Congress must have adopted in Section 7; and (2) evidence of the activities of typical underground miners in the plaintiffs' ore mines, in order to prove that their traveling and walking time is not within the purview of the language of the Act.

The defendants' evidence has been to prove: (1) That no such custom as contended by the plaintiffs existed, and that if it did it may not be given the effect contended for by the plaintiffs, and (2) that the activities of the underground ore mine employees here in issue have in fact constituted part of their employment and workweek.

1. *Custom or Usage.*

The plaintiffs' evidence as to custom or usage consists chiefly of the terms and agreements under which the defendants and their class of employees have worked and been paid, both by plaintiffs and other employers in the same industry. The plaintiffs contend that the custom has always and universally been such as to exclude any payment for the time spent by underground iron ore mine employees in walking and being transported to and from their usual working places, and to include only payment for time actually spent by such employees at their particular stations underground. The plaintiffs contend that this custom was so well established and understood that Congress must have adopted it in its use of the terms "employ" and "workweek" in Section 7 of the Act.

The evidence has disclosed no such custom. During the greater part of iron ore mining history in this district payment of the producing crews has been on a tonnage basis, the time spent by them at any place or places having no bearing whatsoever on their wages. At other times and places, payment was on a task basis, without regard to hours worked at any point. But plaintiffs place their greatest reliance of proof of custom upon the arrangements and contracts with the defendant labor unions under which the underground ore miners have worked for plaintiffs during the past several years. A typical provision of these contracts is: "Eight hours work per day shall constitute a day's work and forty hours shall constitute a week's work. The eight hours per day means eight hours of work at the usual working place, exclusive of the lunch period." This provision carries little weight in establishment of a custom not to pay for travel time, since in practice no record of the time spent "at the usual working place" has been kept and it was the exception rather than the rule that a man worked precisely eight hours at such a place. The actual practice under those contracts was for the company to arrange a shift which was supposed to run, by way of example, from 6:45 A. M. to 3:15 P. M. at the usual stations of duty underground, with thirty minutes off for lunch. The men in the working stations closer to the underground man unloading stations would usually actually arrive at their working stations before 6:45 A. M. and start working earlier than 6:45 A. M., the men in the furthest working stations would frequently actually arrive later than 6:45 A. M. Quite generally most of the producing crews left their particular stations before 3:15 P. M. In all cases the men were credited with exactly eight hours work, except in very unusual cases, although the time spent "at the usual working place" fluctuated thirty to forty-five minutes per shift as between men. Under these circumstances, regardless of the phraseology of the contracts, the pay was on a shift basis, rather than an hourly basis, and since some of the

men did not spend a full eight hours at their particular stations, it cannot be categorically stated that they received no compensation for at least part of the time spent by them in travelling to and from their usual stations.

It cannot be said that any established usage existed in the method of pay that made it clearly understood, by those concerned with iron ore mining, that the time spent in being transported and walking to and from the usual working places was not work or time spent in the employ of the employer. No custom existed that would indicate that the phrases "employ" and "workweek", used in Section 7 of the Act, would be understood, in their application to underground iron ore mining, to exclude such time from their purport.

Even if the mode of payment of these men did clearly exclude such time as employment and workweek time, it could not provide a controlling construction of Section 7 of the Act. The evidence clearly establishes that the methods of payment of wages were dictated almost entirely by the employers. The employees worked on the best terms they could obtain and the fact that they could not obtain terms that would compensate them for time spent in travelling underground to and from their working stations does not indicate that they did not consider that time as working time. It cannot be said that the way in which the iron ore miners have received their pay establishes, with their free and uncoerced agreement, the proposition that the time in question is not work time. Prior to the enactment of the Fair Labor Standards Act of 1938, iron ore miners repeatedly made efforts to obtain full, or at least a larger partial, compensation for so-called travel time. The fact that they were unsuccessful does not determine that they were erroneous in their contention that such time was work time, nor does it determine that Congress, in using the phraseology of Section 7 of the Act, adopted the prevailing method of payment. Since the usual methods of payment were not arrived at by unhampered

consent of the workers, it would be no more reasonable to assume that Congress, in the Fair Labor Standards Act, adopted the employers' formula than to assume that Congress intended to remedy the practice so far as it may have denied compensation for actual work. That Congress has the authority to abrogate such a practice was made clear in *Holden* v. *Hardy,* 169 U. S. 366, 397, 18 S. Ct. 383, 390, 42 L. Ed. 780, where the court said: "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority."

No matter how strong a custom existed as to payment of ore miners, if the activities here in issue actually constituted employment and work, it could not be contended that the custom prevailed to deny the defendants compensation for the time consumed thereby. An occupational custom or usage cannot operate to avoid the mandate of an Act of Congress. *United States* v. *Houston Belt & Terminal Ry. Co.*, 5 Cir., 1913, 205 F. 344; *Ramsauer* v. *United States,* 9 Cir., 1927, 21 F. 2d 907. See *Holden* v. *Hardy, supra.* Especially is this true in the case of the Fair Labor Standards Act, which is clearly remedial in character. *Fleming* v. *Carleton Screw Products Co.*, D. C. Minn. 1941, 37 F. Supp. 754. The Act was established for the avowed purpose of eliminating detrimental labor conditions (Section 2 of the Act, Title 29, U. S. C. A. §202) and it would be a

mockery of the beneficent purposes of the Act if the provisions prohibiting employment for over a specified number of hours for each workweek, except at an increased rate of compensation, were held to incorporate a custom to pay employees only for a part of the time worked by them. Assuming the time in question is actually working time, there can be no doubt that it must be considered as a part of the workweek within the terms of the Act, and the alleged custom could not avoid the remedial effects of the Act.

Evidence has been introduced of administrative applications of other and similar laws, limiting or specifying hours of labor, to other situations. Because the facts in those cases to which those administrative applications were made, were quite different from the facts of the present cases, little light on the proper construction and application of the Fair Labor Standards Act to these cases has been shed by this evidence.

In the last analysis, therefore, plaintiffs must stand or fall on the question whether the time in issue was employment and work, as a matter of simple fact.

2. *Activities Constituting Work.*

No serious conflict of evidence is apparent as to the liability of the plaintiffs for payment to their underground ore mining employees for the aggregate of time spent on the surface in obtaining and returning lamps, carbide and tools and in checking in and out. The plaintiffs' evidence with respect to this time has been that the employees in question only occasionally obtained and returned tools on the surface, and that obtaining and returning carbide and lamps and checking in and out only consumed short periods of time. Certainly the infrequency of activities or the speed with which they can be performed will not change their essential nature as work, and it seems an inescapable conclusion that the activities mentioned are obviously work. They are performed on the premises of the employer, in

the furtherance of the employer's business, with no benefit to the employee (except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking. This time must be included in the workweek of the employees represented by the defendants.

The second element of time which plaintiffs seek to have adjudicated as not within the workweek is the time spent by the underground ore mining employees in being transported from the surface to points at varying distances below the surface and back again at the end of the shift. In the same category must be considered supplemental rides given the men on the way to and from their underground stations between underground points. The plaintiffs ask for a declaration from this court determining whether this transportation time is within the workweek, without consideration of the actual conditions and manner in which the transportation has occurred. This court is not empowered to make such a declaration. Jurisdiction is delimited by the bounds of the actual controversy presented, and to attempt adjudications beyond those bounds could not be a proper judicial function. See: *Aetna Life Ins. Co.* v. *Haworth*, 1937, 300 U. S. 227, 240 *et seq.*, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000. The actual controversy concerns only the working time of the underground iron ore mining employees in the plaintiffs' iron ore mines, during the time between the effective date of the Act and the commencement of these actions, where and when certain conditions and activities existed and occurred. It is with reference to these conditions and activities, and not with reference to some hypothetical future circumstances, that we must deal with the questions here presented.

It is particularly important in these cases that the problem be approached in this factual manner, because transportation in the abstract might be construed to be a restful

and pleasurable activity for the passengers. In the underground ore mines of the plaintiffs and in the manner in which the underground ore mining employees have been transported, the reverse has been true. The cars in which the employees have been transported have not been designed for comfort, have frequently been merely ore cars bearing remnants of iron ore muck. The cars have been nearly always crowded to the extreme. The positions which the men have been required to assume during the transportation varies from a crouch with their bodies overlaying one another to a rigid propping of legs and arms against the sides of the car and the fellow passengers. These positions were assumed partially because of the press of human bodies in the cars and partially because of the necessity of keeping head and body in a deflected position in order to avoid injury from collision with low points in the roofs of the mine slopes or with projections from the roofs. These conditions have occasionally resulted in injuries of various kinds to the employees when the required degree of restraint and alertness has been relaxed. The trips were, or course, in the comparative darkness and enclosure of an artificially lighted mine. The air was humid and malodorous, the ventilation relatively poor and the heat increasing with the descent into the mine. These conditions are recited not for the purpose of censure of the plaintiffs' manner of maintenance of their mines, for these conditions may well be normal conditions in iron ore mines and practically inevitable. Nevertheless, the conditions are clearly conditions peculiar to the occupation of the men in the class represented by the defendants, conditions replete with hazards, conditions requiring physical exertion and mental alertness, and conditions unpleasant and burdensome to those encountering them.

The evidence has made clear that the transportation was had under the strict control and supervision of the plaintiffs. The plaintiffs prescribed the schedule of the trips, the speed of the trips, the loading of the men into the trips,

the rules of conduct during the trips, and in most cases required the men to ride the trip rather than walk. The plaintiffs contend that these were safety measures that would be applicable to any outsider coming into the mines. But the controls of the plaintiffs over the trips were clearly exercised in the interest of efficient operation of their mining business. Too, it is significant to note that infractions by employees of plaintiffs' controls over these trips caused such employees to be subjected to the discipline of the plaintiffs. Clearly, during the trips, up and down, the men were under the complete supervision of the plaintiffs. This conclusion is emphasized by the fact that frequently men were given their first instructions of the day prior to commencement of their trip down the slope, and it appears that they were always subject to such instructions on the surface regardless of the frequency with which explicit instructions were actually given. This fact further indicates that the employees on the trips down into the mines were engaged in and about the business of the plaintiffs.

We must conclude that the time spent in this type of transportation is worktime. It bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the employers' benefit, and conditions peculiar to the occupation of mining. While time consumed in such transportation is not itself part of the time consumed in the actual production of ore, yet such time is a necessary and incidental part of the actual production of ore.

We do not mean to indicate that every detail of the conditions and activities referred to are requisite to constitute this travel time worktime, because these conditions have varied slightly from mine to mine and from time to time. But these details have generally prevailed, and even the minimization of the essential elements of work, which have here usually been present in some degree, does not change the conclusion that work has in fact been performed. See

Missouri, K. & T. Ry. Co. v. *United States*, 1913, 231 U. S. 112, 34 S. Ct. 26, 58 L. Ed. 144.

The final element of time in issue is the time spent in walking between the points underground at which the men were unloaded on the way in and loaded on the way out and the points at which the men were stationed, i. e. between the underground manloading station and the particular working places.

During these walks, the physical conditions encountered by the men were even more difficult than during the part of the descent spent in riding. The atmosphere becomes warmer and more humid, the ventilation even less effective and the air fetid. The roof is low in places, requiring the walkers to stoop. The footing is irregular, sometimes rough, sometimes wet and slippery, overhead wires (often not insulated or guarded) and pipes must be carefully avoided. The passageways are up and down grades of varying steepness. In short, a very substantial amount of physical and mental energy is required during this walking.

What has been said of the supervision by the employer of the time during which the men are transported up and down the main slope applies equally to the walking time of the men away from and back to the slope.

We find that the time consumed by the men in walking from the underground manloading station to their usual working places and back again at the end of the shifts, was part of their employment and was worktime.

We conclude that the fixed lunch periods of one-half hour during which the employees have been relieved of all duties are not part of their employment or of their workweek.

The conclusions here stated have been reached by examination of the facts existent in the plaintiffs' mines during the period in which the underground ore miners are claiming that they earned unpaid compensation for overtime work under the provisions of the Fair Labor Standards Act. It may be helpful, however, to observe that these conclusions

are the same as those announced in the summary of the so-called "modified portal to portal" opinion of the Administrator of the Wage and Hour Division of the United States Department of Labor on March 15, 1941, which summary is as follows:

"The workday in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine, and ends when he reaches the collar at the end of the shift.

"The workday also includes the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out.

"The workday does not include any fixed lunch period of one-half hour or more during which the miner is relieved of all duties, even though the lunch period is spent underground."

The defendants have filed counterclaims against the plaintiffs for themselves and others entitled to compensation for overtime worked, by virtue of the fact that the time and activity put in issue by plaintiffs' complaints constitutes employment and work. Since we have concluded that the defendants are correct in their general position, these counterclaims will be set down for separate trial and judgment at a convenient date. See Rule 42(b), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c.

Findings of fact, conclusions of law and declaratory judgments, in conformity with this opinion, will be entered in each of these actions.

TENNESSEE COAL, IRON & RAILROAD CO.

v.

MUSCODA LOCAL NO. 123 ET AL.

SLOSS-SHEFFIELD STEEL & IRON CO.

v.

SLOSS RED ORE LOCAL NO. 109 ET AL.

REPUBLIC STEEL CORPORATION

v.

RAIMUND LOCAL NO. 121 ET AL.

No. 10278.

Circuit Court of Appeals, Fifth Circuit.

March 16, 1943.

Appeals from the District Court of the United States for the Northern District of Alabama; Thomas A. Murphree, Judge.

Action for declaratory judgment by Tennessee Coal, Iron & Railroad Company against Muscoda Local No. 123, etc., and others, consolidated with actions by Sloss-Sheffield Steel & Iron Company against Sloss Red Ore Local No. 109, etc., and others and by the Republic Steel Corporation against Raimund Local No. 121, etc., and others. From the judgment, 40 F. Supp. 4, plaintiffs appeal.

Judgment modified, and as modified affirmed and cause remanded with directions.

Before Sibley, Holmes, and McCord, Circuit Judges.

Holmes, Circuit Judge.

These appeals are from a judgment declaring that the working time of underground iron-ore mining employees, comprising the work-week of such employes under Section

7 of the Fair Labor Standards Act of 1938,[1] includes time spent by them on the surface in checking in and out, obtaining and returning tools, lamps, and carbide, and time spent underground from the time they are required to report at the portal of the mine until they emerge therefrom at the end of their shift, less the fixed lunch period during which the employees are relieved of all duties; and declaring further that, since such aggregate working time exceeded the maximum work-week provided by said Act, appellants violated the Act in not compensating the employees as therein provided.

Appellants, corporations principally engaged in mining iron ore, filed separate civil actions under the Declaratory Judgments Act,[2] which were consolidated for trial, and as to which a single judgment was entered without objection. The actual controversy underlying federal jurisdiction related only to the hours of employment during the time intervening between the effective date of the Act, October 24, 1938, and the dates the respective petitions were filed in April, 1941. Upon a pre-trial conference it was agreed that the primary issue was what constituted the working time that made up the work-week of the underground ore-mining employees within the meaning of Section 7 of the Fair Labor Standards Act.

Section 7 of the Act requires every employer to pay overtime wages to any employee that is engaged in commerce or in the production of goods for commerce for a work-week longer than 44 hours between October 24, 1938, and October 23, 1939, longer than 42 hours between October 24, 1939, and October 23, 1940, and longer than 40 hours thereafter. The Act defines the word "employ" to include "to suffer or permit to work." § 3. It is without dispute that, during the period involved in this suit, each employee represented by appellees was engaged in the production of goods for commerce, and that each appellant required its

[1] 29 U. S. C. A. § 207, 52 Stat. 1060, 135 F. 2d 21.

[2] 28 U. S. C. A. § 400.

underground employees to work 40 hours each week at their regular working places in the depths of the mine. Whether, in addition thereto, such employees were entitled under the Act to have included in the computation of their work-week the time consumed each week in travelling from the portal of the mine to their regular working places, and in returning therefrom to the portal at the end of the shift, plus the aggregate of the time consumed each week by such employees in checking in and out and obtaining and returning lamps, carbide, and tools on the surface, or whether they were entitled to have any part of such time included in the working time comprising the work-week, is the precise question for decision.

The Act was drafted for application on a national scale, and it does not undertake to define what is working time in any particular industry or class of industries. What constitutes working time is a question of fact depending upon the particular circumstances, and is a matter for the determination of the courts in controverted cases. In the great majority of instances no question of this nature will arise; but in doubtful cases such as this the issue must be determined in accordance with common sense and the general concept of work or employment; and, as in other cases, the appellate court is controlled by the rule that the finding of the trial court upon decisive questions of fact must be upheld unless it is clearly erroneous.

There is no real dispute as to the facts upon which the travel-time question turns, but different inferences as to the working time may fairly and reasonably be drawn from these facts. The parties on both sides of this controversy petitioned the court below to decide the controverted issues between them, i. e., to find the facts, declare the law, and enter a declaratory judgment accordingly. The jurisdiction of the court below and of this court having been rightfully invoked, we are compelled to decide the issue as to work-time without regard to what may be the result of an accounting between the parties. Courts

should not consider the consequences of their legal decisions, except in trying to ascertain the legislative intent in enacting a statute of doubtful meaning; and, whatever may be said as to inferences from the facts, the law of this case is not doubtful. Moreover, no one can say at this time what will be the result of an accounting to be had in the future. We must limit our decision to the issues presented.

At the beginning of the shift the underground employees were required to report at the portal of the mine at a specified time, there to deposit their identification check at the tally office and to board the conveyance provided by the company for transportation to a man-unloading station inside the mine. The men rode in skips or ore cars, which were usually coated with grime of the mine, and assumed a crouched position to minimize the hazard of hitting their skulls against the low tunnel ceiling. Upon reaching the underground station the men left the skip and walked the remaining distance to their respective working places. They were obliged to exercise caution at all times to avoid contact with uninsulated electric wires and other hazards, and carried several pounds of equipment to be used in their work during the day. The men frequently were given instructions as to when and how they should perform their respective duties before the skips left the portal of the mine, and at all times during the descent they were subject to company rules and under company control. The return to the portal at the end of the shift was accomplished in the same manner and under the same conditions.

After considering these and other facts of a similar nature, the court below found as a fact that all of the time thus consumed was work-time and should have been included in the computation of the employees' work-week.[3] Since this travel-time was spent on the employer's prem-

[3] *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123 et al.*, D. C., 40 F. Supp. 4.

ises and subject to its directions, since it exacted mental and physical exertion from the employees under conditions both hazardous and unhealthful, and since it was a course of action pursued solely as a necessary incident to the prosecution of the employer's business, we are unable to say that this finding of the court below was clearly erroneous.

Appellants contend that the industrial history and contractual course of dealing between the parties showed conclusively that travel-time in these iron-ore mines was not working time. It may be conceded, arguendo, that for twenty-five years prior to 1938 iron-ore miners had not been compensated for travel-time, and that even after 1938 the parties to this suit had entered into contracts whereby it was agreed that no wages should be paid for travel-time; but the very purpose of the Fair Labor Standards Act was to eliminate labor conditions detrimental to the general welfare of workers, and the remedial machinery set up to accomplish that purpose regulated hours of work and rates of pay. Industrial custom does not warrant the continuation of abuses that the Act was created to rectify; and no contractual agreement that compensation should not be paid for travel-time is valid if in conflict with the Act. The record discloses that this agreement was not a simple statement of admitted fact, but was a compromise adjustment of real differences reached by way of negotiation and concession, and that the workers, though vainly, insisted upon their right to be paid for travel-time.

With respect to time spent by employees checking in and out and procuring and returning tools, lamps, and carbide, the case stands differently. It appears that the workers were obliged to furnish their own tools, lamps, and carbide, and were free to exercise their own judgment as to when, where, and how they should procure their equipment. The company merely instructed them as to the equipment needed, and did not attempt further to regulate the matter. The checking system used by appellants required the employees only to deposit a metal disc at the

tally house when arriving for work, and to pick it up again at the end of the shift. In addition to the practical difficulties incident to the computation of isolated moments so elusive in character, we think these pursuits should not be computed as work-time, since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment.

Applying Section 7 of the Act to the facts of this case, we hold that the time spent by underground mining employees of appellants, from the time they were required to report and did report for work at the portal of the mine until they returned to the portal of the mine at the end of the shift, less the regular lunch period when they were relieved of all duties, constituted working time comprising the work-week; that appellants have not compensated said employees for some of said working time; and that reference of the cause to a master for calculation of amounts due said employees was proper.

It is ordered that the judgment appealed from be, and the same hereby is, modified so as to conform to our holding as to work-time. As so modified, the judgment is affirmed; and the cause is remanded to the district court for further proceedings not inconsistent with this opinion.

Sibley, Circuit Judge (dissenting).

The judgment about to be entered, in my opinion, misconstrues and misapplies the Fair Labor Standards Act, and visits on the appellants most unjustly a heavy pecuniary penalty; and if followed in other cases and by other courts will cause great confusion in the iron and coal mining industries at a time when the country can least afford confusion.

The Act does not define "work time" or even "work". It may apply to each and every industry. What would be work in one industry may not be in another. It seems to me that a man is at work, for the purposes of the Act, when he is doing what he is hired to do. It may involve mental

or physical effort, or it may consist in simple presence. It all depends on the contract of hiring. The Act did not intend to upset and nullify the wage contracts of force in the various industries. It simply fixed minimum wages for work done under them, and maximum hours. Of course contracts yield to the Act on these points, but they still control as to the work to be done, and the way it is to be done, and as to the scale of pay if not less than the minimum fixed by the Act. These things are left to bargaining, and especially to collective bargaining under the principles of the National Labor Relations Act, 29 U. S. C. A. § 151 et sq.

No question is older in such bargaining than the question whether "travel time" is to be included in "work time". The worker has always thought he ought not to lose all of the time necessary to go to and from his place of work; the employer has thought he ought not to pay for time that produces no work results. The dispute has been resolved in various ways in employment contracts for pay estimated by the hour. Plumbers demand and get pay from the time they leave their place of business to go to a job until they return. Railroad trainmen get pay from the time they report for duty, no matter what delay may occur in the starting of the train. Railway trackmen also are paid from the hour of their assembly at the section point, though they may ride their motor car for miles before doing any track work. On the other hand carpenters, masons, and most artisans and laborers are paid for work only after they take up their tools on the job. As to coal and iron ore miners, traditionally they have been paid according to production, but their modern contracts have always included an express agreement as to their work time, and that agreement has excluded from work time the travel time in reaching the coal seam or ore bed, which were agreed to be the place of work. This is true of the collective bargains made by strong unions throughout the Appalachian region, as it is true of the bargains under which the miners in this case

have worked.[1] Their work time is agreed to be that spent at the ore bed. The employers' arrangement to get them to that place reliably and safely is primarily for the benefit of the miner and is not work for the employer, according to these agreements. The discomforts and dangers of the trip, as well as the loss of time, are all considered in fixing the rate of pay for the work of extracting the ore, and the pay scales here involved are far above the minimum fixed by the Act. The miner's work is hard and dangerous, but his pay is supposed to compensate for all this. If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in futuro, and not by unexpected penalty, as here.

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[1] On Sept. 18, 1933, the President approved a code for the Bituminous Coal Industry under the National Industrial Recovery Act 48 Stat. 195, which provided: "Seven hours of labor shall constitute a day's work and this means seven hours of work at the usual working places for all classes of labor exclusive of the lunch period, whether they be paid on the day, or the tonnage, or other piece work basis."

The Appalachian agreement, which was and is the basis of the Union contracts with the eastern coal mines contains the provision: "Seven hours of labor shall constitute a day's work. The seven hour day means seven hours work in the mines at the usual working places for all classes of labor, exclusive of the lunch period,, whether they be paid by the day or be paid on the tonnage basis."

Under these contracts "the usual working place" for miners has been universally understood to mean the face of the coal seam, and "travel time" to reach the seam is not "work time". The contracts and the practice have been of this sort since the eight hour day was established in 1898.

The contract between appellant Tennessee Coal and Iron Company and the union of its miners signed in October, 1938, Sec. 4, defined a day's work as eight hours, and a week's work as forty hours. "The eight hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or paid on the tonnage basis." As in coal mining, the usual working place of the miner has always been the face of the ore bed. The other appellants had more or less formal contracts to the same effect. Travel time has never been paid or expected under any of them.

There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act.

Though these miners are paid according to their production of ore, they may not under the Act be employed, that is, "suffered or permitted to work", longer than the maximum hours per week without increased pay. These mines provide against that by fixing the hours at which they admit the miners and require them to leave, and especially by limiting the hours during which power is furnished for their drills. Section 7 of the Act has not been violated in this case unless the travel time is counted as work time, contrary to the contracts of employment and contrary to the expectations of those concerned for the past four years. Identical provisions in the employment contracts of the coal miners were decided by the Administrator to be good under the Act, and his conclusion was published, and thought applicable to the contracts here involved, until recently another position was taken as to iron mines.

It is now proposed to assess against these appellants as back pay for overtime an estimated quarter of a million dollars, to be doubled by way of penalty, to compensate the miners for their time in going to and from their place of work, in the face of their agreements that this time was not in their work time. They are to get three times as much per hour for riding and walking to and from the work they

were hired to do, as they get for doing the work itself. The injustice of it to me is shocking.

If the decision stands and is followed, chaotic conditions will ensue, and this is good ground to believe that Congress intended no such thing. If for travel time triple back pay is due by these mines, it is due by all the iron mines having similar wage agreements. Many will go broke, or have to cease operations, causing a loss of jobs to their men. The new mines are not deep, and travel time is negligible, but one of the mines here involved is old and extensive, and the travel time is about one and a half hours per day. This is nearly a quarter of the present work day of seven hours. If that time is to be unproductive, but as costly as the production time, this mine can hardly survive. The wage scales for each mine everywhere will have to be renegotiated to adjust business for the future to the new conditions, with the risk of discontents and strikes.

The decision will have to be applied also to the coal mines. Coal and iron ore occur in similar beds, and are mined in the same general way. In both, the old mines have the same difficulties. The collective agreements made by strong unions throughout the Appalachian country all contain the provision as to worktime we are now dealing with. When the Administrator first proposed to contend for what this court is about to do, it was the unions who objected most cogently, and successfully. The letter of the Legal Director of United Mine Workers of America[2] to

[2] Letter of Earl E. Houck to Philip B. Fleming, Administrator, dated July 9, 1940. That letter states, among other things: "Travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898. It is urged that any ruling requiring such a change in the custom, tradition, and contract provision so as to change the work day from 'seven hours' work in the mines at the usual working places to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos and would probably result in a complete stoppage of work at practically all of the coal mines in the United States."

the Administrator which appears in this record is a very strong argument against the invalidating of the agreements. That argument prevailed then. It ought to prevail now, for it applies as exactly to the iron ore workers as it did to the coal miners. The chaos predicted for the latter will come to both if the Act is so interpreted as to invalidate all these agreements.

TENNESSEE COAL, IRON & R. CO.

v.

MUSCODA LOCAL NO. 123, ETC., ET AL.

SLOSS-SHEFFILD STEEL & IRON CO.

v.

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.

REPUBLIC STEEL CORPORATION

v.

RAIMUND LOCAL NO. 121, ETC., ET AL.

No. 10278.

Circuit Court of Appeals, Fifth Circuit.

July 27, 1943.

Appeals from the District Court of the United States for the Northern District of Alabama; Thomas A. Murphree, Judge.

On petition for rehearing.

Petition denied.

For prior opinion, see 135 F. 2d 320, affirming, as modified, a decision of the District Court, 40 F. Supp. 4.

Before SIBLEY, HOLMES, and MCCORD, Circuit Judges.

HOLMES, Circuit Judge.

In the petition for a rehearing it is stated that the court's opinion in this case is far-reaching in its effect, extending to all iron-ore, limestone, and coal-mining employees in the United States, and "is of the greatest concern to millions of people and the general public". In the same petition it is argued that the facts upon which the court's conclusion was based "applied to only a few of the appellants' employees

and never applied to a great many employees". Passing over the inconsistency of these statements, it is only necessary to say that if the facts on which our opinion is based apply only to a few of appellants' employees, then the law as we have declared it affects only those few, because the law arises out of the facts: *Ex facto jus oritur.*

The parties agreed below that if the issue as to working time should be decided against appellants, the court should then determine whether or not the employees were entitled to recover and, if so, how much. In the absence of this agreement there was nothing to show that reference to a master for an accounting was necessary after the issue as to working time was finally adjudicated. A declaratory judgment is for the purpose of finally settling an actual controversy, and ordinarily should not be entered if it will not do so. We do not understand that appellants even now are objecting to the reference. They seem to think they have been cut off from presenting defenses to claims against them on the accounting; but in this they are in error except that the declaratory judgment herein as to what constitutes working time will be *res judicata* in any controversy that may arise between the same parties. In order to remove all doubt on this subject, it is ordered that our former opinion and judgment be amended by striking out the following: "that appellants have not compensated said employees for some of said working time."

The apparent confusion in which the appellants find themselves is doubtless caused by their failure to recall the nature of the actions that they themselves originally instituted. This appeal involves three separate civil actions that were consolidated for trial in the court below and disposed of by a single judgment. All of these suits were brought under the Federal Declaratory Judgments Act, which provides that in cases of actual controversy the courts of the United States shall have power to declare the rights and other legal relations of any interested party petitioning therefor, and that such declaration shall have the force and

effect of a final judgment or decree and be reviewable as such.[1]

This is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction. It should be given a liberal construction and application.[2] A court may not arbitrarily refuse to exercise such jurisdiction in a proper case, but must decide the issue presented in accordance with the law and the evidence. The procedure is expressly provided for in number 57 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, and the technicalities of equity practice do not prevail therein. The courts are limited in their jurisdiction to cases of actual controversy of a justiciable nature, thus excluding an advisory decree.[3]

In the case before us both sides joined in the petition for a judicial declaration of the rights and legal relations of the parties, and no objection was made to a consolidation of the cases for trial or to the entry of a single judgment containing such declaration. On the contrary, at a pretrial hearing it was agreed by all of the parties that the primary issue in controversy was what constituted the working time that made up the workweek of employees within the meaning of Section 7 of the Act, 29 U. S. C. A. § 207. The contention of each side was stated, and it was agreed that, if the court decided the above issue against appellants, it would then determine whether appellees were entitled to recover and, if so, how much. The rights of all parties were reserved to present their respective claims and defenses upon an accounting. From these and other agreements in the record,[4] it appears that there is only one controverted issue before us at this time, which is what consti-

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[1] Judicial Code, Sec. 274d, as amended, 28 U. S. C. A. § 400; Rule 57 of Federal Rules of Civil Procedure.

[2] *Mississippi Power & Light Co. v. City of Jackson*, 5 Cir., 116 F. 2d 924, certiorari denied 312 U. S. 698, 61 S. Ct. 741, 85 L. Ed. 1133.

[3] *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699.

[4] R. pp. 278-283.

tutes the working time of these underground ore-mining employees.

The objections to the majority opinion raised on the petition for rehearing may be subdivided, and stated under three heads, as follows:

(1) That the declaration is too narrow to cover all but a few of appellants' employees.

(2) That it is so restricted as to time as to include only the period extending from the date of the Act to the filing of suit.

(3) That this court erroneously declared the law as to when the working time of the employees began and ended.

As to the first objection, we have previously pointed out that the declaratory judgment is limited by the facts of the case. It is decisive of the exact controversy that appellants petitioned the court to determine and agreed was the primary issue to be decided. They asserted, and asked the court to say, that no part of the time spent by their underground employees in the bath house, or in going to and from the bath house, or to and from the portal, or to and from the man-loading station, or to and from their actual working places, constituted a part of the workweek under Section 7 of the Fair Labor Standards Act. We held, in substance, that no part of the time spent in going to and from the bath house, or in the bath house, or in going to and from the portal, was working time, but that the employment began at the time the employees were required to report and did report at the portal for departure underground, and ended upon their return thereto at the end of the shift, less the lunch period. If not required to report at any special time, as contended, then the compensatory employment should begin at the time of departure for the trip underground.

The second objection is that this court did not declare the rights and legal relations of the parties as they existed or may exist subsequent to the date suit was filed. There

are no facts in the record to support a finding covering this period, and no finding thereon was made by the district court; but we were told at the hearing, and it is stated in one of the briefs, that after the filing of these suits wages were paid upon a portal-to-portal basis. We cannot enter advisory judgments upon hypothetical facts. The declaratory judgments procedure does not change the essential requisites for the exercise of judicial power. The courts are limited in their juridiction to cases of actual controversy of a justiciable nature.[5] We have, therefore, decided the only actual controversy over which we have jurisdiction; and the plenary effect of the judgment as *res judicata* is ample protection for the future.

The third point stressed by appellants is that a mixed question of law and fact was submitted to the district court, in answer to which it incorrectly found the facts and erroneously declared the law. On appeal both contentions may be reduced to a single question of law, which is: Was the finding of fact of the court below as to working time clearly erroneous? In reviewing the decision of the trial court we are bound by Rule 52 of the Federal Rules of Civil Procedure, which provides that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Even where there is no dispute about the facts, if different reasonable inferences may fairly be drawn from the evidence, an appellate court is forbidden to disturb the findings based on such inferences unless they are clearly erroneous. That this dispute turns upon questions of fact does not withdraw it from judicial cognizance in an action

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[5] *Nashville, C. & St. L. R.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699; *Ætna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; *Gully, Tax Collector*, v. *Interstate Nat. Gas. Co.*, 5 Cir., 82 F. 2d 145.

for a declaratory judgment. "The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is everyday practice."[6] The parties saw fit to submit the issues of fact to the court, without a jury, but this does not render indistinguishable the issues of law and fact. What constituted the workweek of these employees and how many hours they were suffered or permitted to work are questions of fact.

Upon reviewing the judgment as to the facts, an appellate court looks first to the findings of the court below, and then to the evidence in the record to ascertain whether or not those findings are clearly erroneous. The character of the controversy and the issue to be determined are the same as if this were merely an action by an employee for damages under Section 7 of the Act, viz: How many hours constituted his workweek or how long did his employer suffer or permit him to work? In its ultimate aspect this is a dispute over wages, only one element of which is in controversy: the working time, which is a factual quantity of wages just as the regular rate is a factual element of wages. These two factors multiplied together form the product that indicates the compensation.

The statute simply says that no one shall be employed for a workweek longer than the hours stated unless the employee receives compensation for the excess hours at a rate not less than one and one-half times the regular rate. That is all the pertinent law involved in this controversy. It is the only statutory provision necessary to be construed. It must be liberally construed.[7] The language is plain; it requires no outside aid in its interpretation; it contains simple words that are in common use; and, under

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[6] *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 242, 57 S. Ct. 461, 465, 81 L. Ed. 617, 108 A. L. R. 1000.

[7] *Bowie* v. *Gonzalez*, 1 Cir., 117 F. 2d 11; *Carleton Screw Products Co.* v. *Fleming*, 8 Cir., 126 F. 2d 537.

fundamental rules of construction, such words must be given their usual and ordinary meaning.[8] The statute itself defines the word employ to include and suffer or to permit to work. The legislative intent is clear, but it is expressed in general terms and does not extend to particular instances. The myriads of circumstances in which it would be necessary to determine working time in individual cases or classes of cases could not be covered with particularity by statute.

The record in this case presents no substantial question of law except whether or not the finding of the district court as to working time was clearly erroneous. This depends upon whether the inference, which was the basis of the finding, was a reasonable one. As modified by us, we think it was, because the ordinary man might fairly have drawn it from the evidence. It was a deduction that the average disinterested person might naturally have made from the facts. The deduction being warranted by the facts, it was not arbitrary and not clearly erroneous. This being true, the rule above quoted is that the finding "shall not be set aside".

These mines are located in Alabama. The contract of employment is being performed there, and the law of that state governs its performance subject to the overriding provision of the federal act that requires payment to employees of additional compensation for employment in excess of the hours specified. This controversy is over the amount of wages that should be paid; it turns upon the number of hours that the miners were employed within the meaning of the Act. There is no decision of an appellate court directly in point, though there is one from a federal district

[8] *Hamilton* v. *Rathbone*, 175 U. S. 414, 421, 20 S. Ct. 155, 44 L. Ed. 219; *Mackenzie* v. *Hare*, 239 U. S. 299, 308, 36 S. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645; *Caminetti* v. *United States*, 242 U. S. 470, 485, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; *Louisville & N. R. Co.* v. *United States*, 282 U. S. 740, 759, 51 S. Ct. 297, 75 L. Ed. 672.

court in Idaho.[9] Workmen's compensation cases are not very helpful; they prove too much;[10] but one of them is of value not as a compensation case but as an authority to support our ruling that what is working time is a question of fact.[11] There is a decision under the Hours of Service Act[12] wherein the Supreme Court held that members of a train crew under orders, liable to be called at any moment and not at liberty to go away, were none the less on duty when inactive. The court said: "Their duty was to stand and wait."[13]

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[9] *Sunshine Mining Co.* v. *Carver, D. C.*, 41 F. Supp. 60, wherein the court held that time spent by miners in traveling from portal of mine to their usual place of work and back to portal should be included in hours worked, for which they were entitled to compensation under the Fair Labor Standards Act. See, also, *Sirmon* v. *Cron & Gracey Drilling Corp.*, D. C., 44 F. Supp. 29.

[10] In such cases the employee is generally protected while on or about the premises of his employer. In *Jett* v. *Turner*, 215 Ala. 352, 110 So. 702, at p. 704, the Supreme Court of Alabama said: "While the employee is being transported by the employer pursuant to the contract of employment, it cannot be questioned they have entered upon the day's work wherein mutual duties of employer and employee are presently being performed. The pay of the employee has begun, not in wages, but in service * * *."

See, also, *Overton* v. *Belcher*, 232 Ala. 396, 168 So. 442; *Moss* v. *Hamilton*, 234 Ala. 181, 174 So. 622.

Moss Tie Co. v. *Tanner*, 44 F. 2d 928, was a case, from the 5th Circuit under the Longshoremen and Harbor Workers' Compensation Act, 33 U. S. C. A. § 901 et seq., holding that an employee is generally in the course of employment while going to or from place of work by only practical route.

In *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 48 S. Ct. 221, 222, 72 L. Ed. 507, 66 A. L. R. 1402, under the Workmen's Compensation Act of Utah, the United States Supreme Court said that the employment may begin in point of time before the work is entered upon and, probably as a general rule, may be said to begin "when the employee reaches the entrance to the employer's premises where the work is to be done."

[11] *Overton* v. *Belcher*, 232 Ala. 396, 168 So. 442.

[12] Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U. S. C. A. § 61 et seq.

[13] *Missouri, K. & T. R. Co.* v. *United States*, 231 U. S. 112, 119, 34 S. Ct. 26, 27, 58 L. Ed. 144.

The law in dispute in the instant case covers less than a page,[14] but the facts are contained in seven volumes of a printed record of nearly five thousand pages. The federal act does not supersede the local law in the several states except to the extent of a conflict between them. It is for this reason that we attach importance to an Alabama decision distinguishing between a finding of fact and a conclusion of law.[15] In that case the court did not discuss the distinction, but what courts do is sometimes more important than what they say; and this is what the Alabama court did: Upon an issue as to the relation between the workman and the employer, it set aside the trial court's conclusion of law as inconsistent with its finding of fact. If the status of a workman when injured on the defendant's premises is a factual condition, the same is true as to the activities of miners. In the case cited we find the Supreme Court of Alabama drawing the distinction between questions of law and fact. The same distinction exists in federal law and proceedure, and there is nothing to the contrary in the Fair Labor Standards Act.

If the Alabama law governs, then why does not the agreement as to rates of pay and hours of employment prevail? The answer is this: It does except to the extent that the agreement conflicts with the paramount provisions of federal law. No agreement as to the hours worked or as to the time of employment is valid if the actual employment is longer than the time stipulated and is in excess of the hours specified in Section 7 of the Act. Whether one is working, resting, idling, playing, or preparing to work is as much a matter of fact as whether one is asleep or awake, or is laughing or crying. In *Skidmore* v. *Swift & Co.*, 136 F.

[14] No employer shall employ any of his employees for a workweek longer than 44, 42, or 40 hours, respectively, "unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Sec. 7(a) of Act of June 25, 1938, c. 676, 52 Stat. 1063, 29 U. S. C. A. § 207.

[15] *Overton* v. *Belcher*, 232 Ala. 396, 168 So. 442.

2d 112, this court recently held, in an action for overtime compensation under 29 U. S. C. A. § 207, that the burden was on the employees to segregate the actual hours of their employment from the time spent by them in playing, sleeping, bathing, shaving, and dressing. So we say the Act does not define these instances; their peculiar character must be determined by evidence. Two people may be in swimming, an instructor and his pupil; one will be working and the other playing. The working time of every miner is a definite controlling fact that can and must be finally determined in order to fix the amount of wages due him under the federal statute. It is a fact that cannot be found in any statute or decision or law book (except statutes not applicable in this case), but must be determined by the court or jury in any justiciable controversy wherein a real issue arises with respect thereto.[16]

In a supplemental brief, one of the appellants says that the effect of our decision, the plain and definite holding of the majority, is that as a matter of law the time consumed in traveling from the portal of the mine to the face and in returning therefrom to the portal "must be included in the

[16] The court below found the following: The employees were required to report at the beginning of a shift in time to catch the vehicle on one of its trips underground. After reporting at the mouth of the mine the men were daily subject to instructions by the company, and frequently were given their first instructions of the day prior to entering the slope. They were forbidden to enter the mines until their brass checks had been deposited at the tally house. At this point vacancies in working crews were ordered filled by company officials; the head miner or crew foreman began to assemble his crew and to issue orders to its members. When the miners reported at the mouth they were in their working clothes and had their indispensable lamps. The loading of the men into the vehicle in which they were to be transported, as well as the speed and schedule of the vehicle, were under the control and supervision of appellants. They required the men to ride rather than to walk, and required certain ones to ride on particular trips. The miners, being under the disciplinary rules of the company and the supervision of its officials, were subject to conditions peculiar to their occupation from the time they entered the portal until their exit therefrom.

working time that makes up the workweek of every ore-mining employee within the meaning of Section 7 of the Fair Labor Standards Act". We did not so hold, and such should not be the effect of our decision.

We have written in vain if our opinion is to be interpreted as providing a rigid definition of working time, or as upholding the portal-to-portal theory as a matter of law, or as denying the principle that in close cases it is well to afford the fullest possible scope to agreements among the individuals who are actually affected. The evidentiary value of such agreements in relation to working time is for the jury or other fact-finding tribunal.[17] We have expounded no rigid definition of working time. The Act fails to provide one, and we should not do what was deemed unwise to do by legislation. The Congress probably failed to define working time for the same reason that it refrained from attempting to define the regular rate of pay, namely, "because the employment relationships to which the Act would apply were so various and unpredictable".[18]

Appellants sought by declaratory judgment to obtain a rigid definition of working time favorable to them. They now chide us for laying down such a definition against them. We did not do either; we merely refused, because not clearly erroneous, to set aside a finding supported by evidence as to what constituted working time of employees in the particular circumstances. The Act of Congress in this respect differs from the legislation of those mining states

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[17] Agreements as to working time or the rate of pay are not conclusive if the parties do not act in conformity to the agreements. The court below found that during approximately sixty years of iron-ore mining in the Birmingham district red-ore miners had been paid without regard to the number of hours spent daily at the face or at any specified place or station; and that there had never been any custom under which the miners were paid solely for time actually spent at their particular stations underground.

[18] *Walling* v. *A. H. Belo Corporation*, 316 U. S. 624, 634, 62 S. Ct. 1223, 1229, 86 L. Ed. 1716, 1723.

that limit work-time in underground mines to eight hours per day, and that include in this reckoning all time spent underground.[19]

The pertinent distinction between such state legislation and the Fair Labor Standards Act is that the state legislatures themselves drew the inference of fact as to the working time of miners and enacted a general law on the subject, whereas the Congress failed to provide a general rule or definition in any particular industry. As appellants themselves have pointed out, Section 7 is not limited in its application to any single industry, but is designed to provide a law as to overtime compensation for every sort of work to which the statute is applicable. A detailed code for each industry would have been utterly impracticable. Application to each particular situation of the uniform rule laid down by Congress was wisely left to the courts. Therefore, in actions under the Fair Labor Standards Act, the courts must decide justiciable controversies as to working time upon the law and the facts in accordance with the principles governing their jurisdiction and procedure. Unless the facts are undisputed and only one reasonable inference may fairly be drawn therefrom, what is working time is always a question of fact for the court or jury. In view of the diverse legislation above cited, and the general diversity of opinion on the subject, it cannot successfully be

[19] Arizona Laws of 1912, c. 28, Secs. 2 and 3, p. 59; Arizona Code Ann. (1939), Vol. 4, Secs. 56-115; Utah Laws of 1937, c. 59, amending Rev. Stat. (1933), Secs. 49—3—2. Cf. Nevada Comp. Laws (1929), Vol. 5, Sec. 10237. In the Wyoming statute an express disclaimer was inserted excepting "time consumed in going to and returning from work". Wyo. Rev. Stat. Ann. (1931), Secs. 63-103, 63-107. The Nevada statute limits underground work to eight hours, and provides that this shall "include the time employed, occupied, or consumed from the time of reaching the point of employment or place of work in any underground mine, and in returning to the surface from said point or place of work, and that it is the intent and purpose of this act that the period of time between arriving at the point or place of work, in any underground working, and returning to the surface from such point of work shall not exceed eight (8) hours within any twenty-four hours."

argued in this case that only one fair and reasonable inference may be drawn from the facts and circumstances in evidence.

Although from a state court decision,[20] the following is highly persuasive upon the point under discussion:

"The trior of an issue of fact, whether judge or jury, where the ultimate fact to be proven depends on the surrounding facts and circumstances of the transaction out of which the ultimate fact grew, must by process of reasoning and deduction find the ultimate fact. If, from the undisputed facts and circumstances, two reasonable inferences of fact may be drawn, which inferences are conflicting, and the trior of the issue of fact has found in favor of one as the more reasonable, such finding will not be set aside on appeal, unless against the overwhelming weight of the evidence.

"The chancellor in this case heard and saw the witnesses testify, and observed their demeanor on the witness stand. It could have been reasonably inferred from the undisputed evidence that the transfer of the bank deposit was intended as a gift absolute, and, on the other hand, it could have been reasonably inferred that it was a transfer in trust. The chancellor found that the latter was the more reasonable inference. The two inferences, of course, were conflicting. The chancellor settled the conflict. This court cannot substitute its judgment for his."

That the federal rule is practically the same, see *South Chicago Coal & Dock Co.* v. *Bassett*,[21] wherein the petitioners urged that whether the decedent was a member of the crew was a question of law, since the facts were undisputed; but the Supreme Court held it to be one of fact, and said that even if the evidence permitted conflicting inferences there was enough to sustain the Commissioner's ruling. In

[20] *Huckaby* v. *Jenkins*, 153 Miss. 359, 361, 121 So. 130, 131.

[21] 309 U. S. 251, 260, 60 S. Ct. 544, 84 L. Ed. 732, 738.

Commissioner v. *Horeshoe Lease Syndicate*,[22] a case from the Fifth Circuit, the court said that a finding of fact must be upheld "even though conflicting inferences fairly might be drawn by reasonable men from the undisputed facts."[23]

All of these decisions are persuasive of the correctness of our construction of that portion of Rule No. 52, previously quoted, which is that, in actions tried upon the facts without a jury, a finding of fact should not be set aside as clearly erroneous if from the undisputed facts and circumstances two reasonable inferences were fairly deducible and the trial court found in favor of one as being the correct inference. Any other construction of the rule would be equivalent to holding that a reasonable inference fairly drawn from undisputed facts was clearly erroneous, which would be reducing the matter to an absurdity. On the other hand, as will be pointed out in the next paragraph, very serious consequences with reference to state mining statutes might follow a final authoritative ruling that the only reasonable inference deducible is that travel-time is not work-time.

If the contention is sound that the court below should have entered a declaratory judgment for appellants, as prayed, but could not correctly enter one against them, as it did, because only one reasonable inference could fairly be drawn from the undisputed facts in evidence (which was that travel-time was not work-time), then the question instantly presents itself as to whether or not the Utah and Arizona statutes are merely arbitrary fiats, violative of the Fourteenth Amendment. The appellants would probably not press their argument to this extent, and yet if it were

[22] 110 F. 2d 748, 750.

[23] Cf. *Turner* v. *New York*, 168 U. S. 90, 95, 18 S. Ct. 38, 42 L. Ed. 392, wherein it was held that a mere inference of fact from the evidence was not reviewable by the Supreme Court on writ of error, that court being authorized to review only questions of law. This decision is authority for the proposition that such an inference as we are considering is a question of fact, and not a mixed question of law and fact as is being contended by appellants.

clearly error for the court below to make the inference it did as to working time, it would be difficult to conceive of facts in existence sufficient to uphold a state statute in which the same inference is not only implicit but must serve as the basis for an absolute rule of law that travel-time underground is work-time.

It being unnecessary for us to decide anything about the propriety of referring the case to a master for an accounting, since the parties have agreed that the court shall determine whether or not the employees are entitled to recover and, if so, how much,[24] the petition for a rehearing is denied.

SIBLEY, Circuit Judge, dissents as to the merits.

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[24] By their conduct and agreements the parties have waived questions of misjoinder of causes of action, misjoinder of parties, and the right of trial by jury. Rules 20, 21, 38, and 39 of Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. A common question of law and fact in a multiplicity of suits is not of itself an independent ground of equitable jurisdiction, either in the courts of Alabama or in the federal courts. *Matthews* v. *Rodgers*, 284 U. S. 521, at page 530, 52 S. Ct. 217, at page 221, 76 L. Ed. 447, and authorities cited. See, also, *Tribette* v. *Illinois Cent. R. Co.*, 70 Miss. 182, 12 So. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, which the Supreme Court of Alabama followed in *Southern Steel Co.* v. *Hopkins*, 174 Ala. 465, 57 So. 11, 40 L. R. A., N. S., 464, Ann. Cas. 1914B, 692, wherein the Alabama court reconsidered its former opinion and adopted the rule announced in the Tribette case upon the question of the jurisdiction of equity to prevent a multiplicity of suits. For a history of the latter case, see *Cumberland Telephone & Telegraph Co.* v. *Williamson*, 101 Miss. 1, 57 So. 559, and Griffith's Chancery Practice, Sec. 439, p. 461.

Supreme Court of the United States.

No. 409.

OCTOBER TERM, 1943.

TENNESSEE COAL, IRON & RAILROAD COMPANY,

Petitioner,

v.

MUSCODA LOCAL NO. 123, ETC., ET AL.

SLOSS-SHEFFIELD STEEL & IRON COMPANY, *Petitioner,*

v.

SLOSS RED ORE LOCAL NO. 109, ETC., ET AL.

REPUBLIC STEEL CORPORATION, *Petitioner,*

v.

RAIMUND LOCAL NO. 121, ETC., ET AL.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

(March 27, 1944.)

Mr. Justice MURPHY delivered the opinion of the Court.

We are confronted here with the problem of determining in part what constitutes work or employment in underground iron ore mines within the meaning of the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. § 201. This question, which is one of first impression, arises out of conflicting claims based upon the actual activities pursued and upon prior custom and contract in the iron ore mines. Such an issue can be resolved only by discarding formalities and adopting a realistic attitude, recognizing that we are dealing with human beings and with a statute that is intended to secure to them the fruits of their toil and exertion.

Three iron ore mining companies, petitioners herein, filed declaratory judgment actions[1] to determine whether time spent by iron ore miners in traveling underground in mines to and from the "working face"[2] constitutes work or employment for which compensation must be paid under the Act. The respondent labor unions and their officials, representing petitioners' employees, were named as defendants and the Administrator of the Wage and Hour Division of the Department of Labor was allowed to intervene. The actual controversy relates only to the hours of employment during the period intervening between the effective date of the Act, October 24, 1938, and the dates when the respective actions were initiated in April, 1941.[3] It is conceded that if underground travel constitutes employment, the miners worked more than the statutory maximum workweek and are entitled to be paid one and one-half times the regular rate for the excess hours. But if the travel time is excluded from the workweek, thus limiting it to the time spent at the working face, no overtime payments are due.

After extended hearings, the District Court found that the travel time "bears in a substantial degree every indicia of worktime: supervision by the employer, physical and mental exertion, activity necessary to be performed for the

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[1] These actions were instituted under the Federal Declaratory Judgments Act, 48 Stat. 955, § 274D, 28 U. S. C. § 400. They were consolidated for trial purposes and the District Court entered a single judgment.

[2] The "working face" is the place in the mine where the miners actually drill and load ore. The "face to face" basis of compensation, advocated by petitioners, includes only the time spent at the working face. The "portal to portal" basis, proposed by respondents, includes time spent in traveling between the portal or entrance to the mine and the working face and back again, as well as the time spent at the working face.

[3] Since May 5, 1941, petitioners have paid their miners for travel time pursuant to contract in compliance with the opinion of the Administrator of the Wage and Hour Division that underground travel in iron ore mines is work within the meaning of the Act.

employers' benefit, and conditions peculiar to the occupation of mining." The court accordingly ruled that the travel time, as well as the time spent at the surface obtaining and returning tools, lamps and carbide and checking in and out, was included within the workweek. 40 F. Supp. 4. The Circuit Court of Appeals affirmed as to the travel time, holding that the District Court's findings on that matter were supported by substantial evidence. The judgment was modified by the Circuit Court, however, by excluding from the workweek the time spent in the activities at the surface. 135 F. 2d 320; rehearing denied, 137 F. 2d 176. The importance of the problem as to the travel time led us to grant certiorari.[4]

Specifically we are called upon to decide whether the District Court and the Circuit Court of Appeals properly found that iron ore miners were at work within the meaning of the Act while engaged in underground travel which they were obliged to perform on the property of and under the direction of petitioners as a necessary concomitant of their employment. The record shows that petitioners own and operate twelve underground iron ore mines in Jefferson County, Alabama,[5] and that the general pattern of facts underlying the findings of the courts below is essentially the same in each of these mines.[6]

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[4] No review has been sought of the exclusion from the workweek of the activities at the surface. We therefore do not discuss that issue in this case. *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 487, and cases cited.

[5] The Tennessee Coal, Iron & Railroad Company has eight mines; Sloss-Sheffield Steel & Iron Company, two mines; and Republic Steel Corporation, two mines.

[6] As the District Court pointed out, the conditions set forth by the record are not intended to be used to censure petitioners' manner of maintenance of their mines, "for these conditions may well be normal conditions in iron ore mines and practically inevitable." Moreover, the record indicates that the Spaulding mine of the Republic Company has been operated only intermittently and experimentally during the last 20 years and many of the conditions in the other mines are not present. The ore is close to the surface and miners can walk all the way to the working faces.

The miners begin their day by arriving on the company property at a scheduled hour[7] and going to the bath house, where they change into working clothes.[8] They then walk to the tally house near the mine entrance or portal; there they check in and hang up individual brass checks, furnished by petitioners, on a tally or check-in board. This enables the foreman and other officials to tell at a glance those individuals who have reported for work and those production and service crews that are incomplete and in need of substitutes. Vacancies are filled and the head miners and crews receive any necessary instructions. In addition, each miner either rents a battery lamp for the day or buys a can of carbide each day or two for underground illumination purposes. And at some of the mines, many miners stop at a tool box or tool house on the surface to pick up other small supplies and tools necessary for their work. These activities consume but a few mintes.

The miners thereupon are required to report at the loading platform at the mine portal and await their turn to ride down the inclined shafts of the mines. Originally the miners could reach the working faces entirely by foot, but as the shafts increased in length petitioners provided transportation down the main shafts. The miners accordingly ride part of the way to the working faces in ore skips[9] or

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[7] One of the Tennessee Company's superintendents stated that "Whenever a man comes to the mine late, dragging along and encourages others to be late, he is setting a bad example. I want this understood thoroughly—men must be on time; we don't care whether they work here or not, but if they want to work here they will have to be on time or else they will be disciplined, even to discharge."

[8] The use of the bath house, or change house, is optional. Some miners change their clothes at home and make no use of the bath houses furnished by petitioners.

[9] An ore skip is an ordinary four-wheeled ore box car made of steel. It is normally used for transporting ore and its floor is often covered with muck from such haulings. When men are riding in the car it is known as a "man skip trip." It is used for such purposes in the mines of the Tennessee Company and the Republic Company.

regular man trips,[10] which operate on narrow gauge tracks by means of cables or hoisting ropes. The operation of the skips and man trips is under the strict control and supervision of the petitioners at all times and they refuse to permit the miners to walk rather than ride. Regular schedules are fixed; loading and unloading are supervised; the speed of the trips is regulated; and the conduct of the miners during the rides is prescribed.

About three to six trips are made, depending on the size of the mine and the number of miners. Ten men sit on each man trip car, while from 30 to 40 are crowded into an ore skip. They are forced to jump several feet into the skip from the loading platform, which not infrequently causes injuries to ankles, feet and hands. The skips are usually overcrowded and the men stand tightly pressed together. The heads of most of them are a foot or more above the top of the skips. But since the skips usually clear the low mine ceilings by only a few inches, the miners are compelled to bend over. They thus ride in a close "spoon-fashion," with bodies contorted and heads drawn below the level of the skip top. Broken ribs, injured arms and legs, and bloody heads often result; even fatalities are not unknown.

The length of the rides in the dark, moist, malodorous shafts varies in the different mines from 3,000 feet to 12,000 feet. The miners then climb out of the skips and man trips at the underground man-loading platforms or "hoodlums" and continue their journeys on foot for distances up to two miles. These subterranean walks are filled with discomforts and hidden perils. The surroundings are dark and dank. The air is increasingly warm and humid, the ventilation poor. Odors of human sewage, re-

[10] A regular man trip is a specially constructed series of cars. Each car is about eight feet long and resembles a stairway. Five men sit on either side of the car facing outwards, back to back with five men on the other side. The man trip used in the Sloss Company mines consists of six such cars.

sulting from a complete absence of sanitary facilities, permeate the atmosphere. Rotting mine timbers add to the befouling of the air. Many of the passages are level, but others take the form of tunnels and steep grades. Water, muck and stray pieces of ore often make the footing uncertain. Low ceilings must be ducked and moving ore skips must be avoided. Overhead, a maze of water and air pipe lines, telephone wires, and exposed high voltage electric cables and wires present ever-dangerous obstacles, especially to those transporting tools. At all times the miners are subject to the hazards of falling rocks.

Moreover, most of the working equipment, except drills and heavy supplies, is kept near the "hoodlums." This equipment is carried each day by foot by the crews through these perilous paths from the "hoodlums" to the working faces. Included are such items as fifty-pound sacks of dynamite, dynamite caps, fuses, gallon cans of oil and servicemen's supplies. Actual drilling and loading of the ore begin on arrival at the working faces, interrupted only by a thirty minute lunch period spent at or near the faces. The service and maintenance men, of course, work wherever they are needed.

At the end of the day's duties at the working faces, the miners lay down their drills, pick up their other equipment and retrace their steps back to the "hoodlums." They wait there until an ore skip or man trip is available to transport them back to the portal. After arriving on the surface, they return their small tools and lamps, pick up their brass checks at the tally house, and proceed to bathe and change their clothes at the bath house. Finally they leave petitioner's property and return to their homes.

In determining whether this underground travel constitutes compensable work or employment within the meaning of the Fair Labor Standards Act, we are not guided by any precise statutory definition of work or employment. Section 7(a) merely provides that no one, who is engaged in commerce or in the production of goods for commerce, shall

be employed for a workweek longer than the prescribed hours unless compensation is paid for the excess hours at a rate not less than one and one-half times the regular rate. Section 3(g) defines the word "employ" to include "to suffer or permit to work," while Section 3(j) states that "production" includes "any process or occupation necessary to . . . production."

But these provisions, like the other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner. Accordingly we view Sections 7(a), 3(g) and 3(j) of the Act as necessarily indicative of a Congressional intention to guarantee either regular or overtime compensation for all actual work or employment. To hold that an employer may validly compensate his employees for only a fraction of the time consumed in actual labor would be inconsistent with the very purpose and structure of those sections of the Act. It is vital, of course, to determine first the extent of the actual workweek. Only after this is done can the minimum wage and maximum hour requirements of the Act be effectively applied. And, in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words are commonly used —as meaning physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.[11]

[11] Webster's New International Dictionary (2d ed., unabridged) defines work as follows: "1. To exert oneself physically or mentally for a purpose, esp., in common speech, to exert oneself thus in doing something undertaken chiefly for gain, for improvement in one's material, intellectual, or physical condition, or under com-

Viewing the facts of this case as found by both courts below in the light of the foregoing considerations, we are unwilling to conclude that the underground travel in petitioners' iron ore mines cannot be construed as work or employment within the meaning of the Act. The exacting and dangerous conditions in the mine shafts stand as mute, unanswerable proof that the journey from and to the portal involves continuous physical and mental exertion as well as hazards to life and limb. And this compulsory travel occurs entirely on petitioners' property and is at all times under their strict control and supervision.

Such travel, furthermore, is not primarily undertaken for the convenience of the miners and bears no relation whatever to their needs or to the distance between their homes and the mines.[12] Rather the travel time is spent for the benefit of petitioners and their iron ore mining operations. The extraction of ore from these mines by its very nature necessitates dangerous travel in petitioners' underground shafts in order to reach the working faces, where production actually occurs. Such hazardous travel is thus essential to petitioners' production. It matters not that such travel is, in a strict sense, a non-productive benefit. Nothing in the statute or in reason demands that every moment of an employee's time devoted to the service of his employer shall be directly productive. Section 3(j) of the Act expressly provides that it is sufficient if an employee is engaged in a process or occupation necessary to production. Hence employees engaged in such necessary but

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pulsion of any kind, as distinguished from something undertaken primarily for pleasure, sport, or immediate gratification, or as merely incidental to other activities (as a disagreeable walk involved in going to see a friend, or the packing of a trunk for a pleasure trip) . . ." The word "employ" is defined as follows: "2. To make use of the services of; to give employment to; to entrust with some duty or behest."

[12] Cf. *Dollar v. Caddo River Lumber Co.*, 43 F. Supp. 822; *Sirmon v. Cron & Gracey Drilling Corp.*, 44 F. Supp. 29; *Bulot v. Freeport Sulpher Co.*, 45 F. Supp. 380; *Walling v. Peavy-Wilson Lumber Co.*, 49 F. Supp. 846.

not directly productive activities as watching and guarding a building,[13] waiting for work,[14] and standing by on call[15] have been held to be engaged in work necessary to production and entitled to the benefits of the Act. Iron ore miners travelling underground are no less engaged in a "process or occupation" necessary to actual production. They do more than "stand and wait," *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S. 112, 119. Cf. *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158. Theirs is a fossorial activity bearing all the indicia of hard labor.

The conclusion that underground travel in iron ore mines is work has also been reached by the Administrator of the Wage and Hour Division. On March 17, 1941, he approved an informal report of his representative based upon an investigation of the "hours worked" in underground metal mines in the United States. The report concluded, in part, that "The workday in underground metal mining starts when the miner reports for duty as required at or near the collar [portal] of the mine and ends when he reaches the collar at the end of the shift." See also *Sunshine Mining Co.* v. *Carver*, 41 F. Supp. 60. In addition, statutes of several important metal mining states provide that the eight-hour per day limitation upon work includes travel underground.[16]

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[13] *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517.

[14] *Fleming* v. *North Georgia Mfg. Co.*, 33 F. Supp. 1005; *Travis* v. *Ray*, 41 F. Supp. 6.

[15] *Walling* v. *Allied Messenger Service, Inc.*, 47 F. Supp. 773.

[16] Arizona and Utah statutes specifically include all the travel time within the eight-hour limitation. Ariz. Code Ann. (1939), vol. 4, sec. 56-115; Utah Code Ann. (1943), sec. 49-3-2. The Supreme Court of Montana has construed Mont. Constit., art. 18, sec. 4, and Mont. Rev. Code (1935), sec. 3071, which provide for eight hours of work per day in underground mines, to include all travel time, *Butte Miners' Union No. 1* v. *Anaconda Copper Mining Co.*, 112 Mont. 418, 118 P. 2d 148. Nevada Comp. Laws (1929), sec. 10237, provides that the limitation shall apply to travel one way. But Wyoming Rev. Stat. (1931), sec. 63-107, specifically excludes underground travel from the limitation; a like result has been

Petitioners, however, rely mainly upon the alleged "immemorial custom and agreements arrived at by the practice of collective bargaining" which are said to establish "the 'face to face' method as the standard and measure for computing working time in the iron ore industry." They further claim that since the Fair Labor Standards Act contains no specific provision regarding underground travel in mines, Congress must be presumed to have intended to perpetuate existing customs or to leave the matter to be worked out through the process of collective bargaining.

The short answer is that the District Court was unable to find from the evidence that any such "immemorial" custom or collective bargaining agreements existed. That court, in making its findings, properly directed its attention solely to the evidence concerning petitioners' iron ore mines and disregarded the customs and contracts in the coal mining industry. There was ample evidence that prior to the crucial date of the enactment of the statute, the provisions in petitioners' contracts with their employees relating to a forty hour work week "at the usual working place" bore no relation to the amount of time actually worked or the compensation received. Instead, working time and payment appear to have been related to the amount of iron ore mined each day. Hence such contract provisions defining the workweek are of little if any value in determining the workweek and compensation under a statute which requires that they be directly related to the actual work performed.

Likewise there was substantial, if not conclusive, evidence that prior to 1938 petitioners recognized no inde-

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reached by interpretation of California Stats. 1909, ch. 181, p. 279, in *Matter of Application of Martin*, 157 Cal. 59, 106 P. 238. Alabama and Tennessee fix no limitation on hours, while maximum hour statutes of other metal mining states are inconclusive insofar as the inclusion of travel time is concerned. See also Section 5(2) of the English Metalliferous Mines Regulation Act (1872), 35 & 36 Vict., c. 77, which provides that "The period of each employment shall be deemed to begin at the time of leaving the surface, and to end at the time of returning to the surface."

pendent labor unions and engaged in no bona fide collective bargaining with an eye toward reaching agreements on the workweek. Contracts with company-dominated unions and discriminatory actions toward the independent unions are poor substitutes for "contracts fairly arrived at through the process of collective bargaining." The wage payments and work on a tonnage basis, as well as the contract provisions as to the workweek, were all dictated by petitioners. The futile efforts by the miners to secure at least partial compensation for their travel time and their dissatisfaction with existing arrangements, moreover, negative the conclusion that there was any real custom as to the workweek and compensation therefor. A valid custom cannot be based on so turbulent and discordant a history; it requires something more than unilateral and arbitrary imposition of working conditions.[17] We thus cannot say that the District Court's findings as to custom and contract are so clearly erroneous as to compel us to disregard them.

But in any event it is immaterial that there may have been a prior custom or contract not to consider certain work within the compass of the workweek or not to compensate employees for certain portions of their work. The Fair Labor Standards Act was not designed to codify or perpetuate those customs and contracts which allow an employer to claim all of an employee's time while compensating him for only a part of it. Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act.[18] Any custom or contract

[17] Blackstone has said that one of the requisites of a valid custom is that "it must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their origin to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting." 1 Commentaries 77. See also Pollock, First Book of Jurisprudence, 283 (6th ed.).

[18] Congress was not unaware of the effect that collective bargaining contracts might have on overtime pay. It expressly decided to give effect to two kinds of collective agreements, as specified in Sec-

falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights. Cf. *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572; *Holden* v. *Hardy*, 169 U. S. 366. See also *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467; *J. I. Case Company* v. *National Labor Relations Board*, No. 67, decided February 28, 1944; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, No. 343, decided February 28, 1944.

This does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible. Nor are we concerned here with the effect that custom and contract may have in borderline cases where the other facts give rise to serious doubts as to whether certain activity or non-activity constitutes work or employment. It is sufficient in this case that the facts relating to underground travel in iron ore mines leave no uncertainty as to their character as work. The Act thus requires that appropriate compensation be paid for such work. Any other conclusion would deprive the iron ore miners of the just remuneration guaranteed them by the Act for contributing their time, liberty and strength primarily for the benefit of others.

The judgment of the court below is accordingly affirmed.

Mr. Justice FRANKFURTER, concurring.

The legal question on the record before us lies within a narrow compass. Section 7 of the Fair Labor Standards Act commands the payment of compensation at a rate of not less than one and one-half times the regular rate for every employee under the Statute who is engaged "for a workweek" longer than forty-four or forty-two hours

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tion 7(b)(1) and (2) of the Act. Cf. Section 8(c). It thus did not intend that other collective agreements should relieve employers from paying for overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts.

during the first or the second year, respectively, after the effective date of the Section and forty hours thereafter. 52 Stat. 1060, 1063, 29 U. S. C. § 207. Congress did not explicitly define "workweek" and there is nothing in the available materials pertinent to construction that warrants a finding that "workweek", as applied to the workers in the iron ore industry, had so settled a meaning at the time of the enactment of the Fair Labor Standards Act as to be deemed incorporated by reference. As a result, "workweek" in this Statute, as applied to workers in this industry and on this record, has no technical meaning, that is, a meaning so well known to those in this particular industry as to be applied by courts in enforcing the Statute when invoked by men in the industry. For purposes of this case, in any event, when Congress used the word "workweek", it used it colloquially—the term carries merely the meaning of common understanding.

An administrative agency for preliminary adjudication of issues arising under the Wages and Hours Law, like that established by the National Labor Relations Act, was not provided by Congress. And so, the application of this colloquial concept "workweek" to the multifarious situations in American industry was left by Congress for ascertainment by judicial proceedings. These facts are to be found either by a jury or, as in this case, by a judge sitting without a jury. And so here it was the judge's duty to determine what time and energy on the part of the employees involved in this suit constituted a "workweek" of these employees of the petitioners. After a trial which lasted for about three weeks, during which testimony covering 2,643 pages was heard and voluminous exhibits were introduced, the District Court made its findings of fact. A judgment for the employees based on these findings was affirmed by the Circuit Court of Appeals. 40 F. Supp. 4; 135 F. 2d 320.

We have then a judgment of two courts based on findings with ample evidence to warrant such findings. Affirmance by this Court is therefore demanded.

MR. JUSTICE JACKSON, concurring.

This case in my view probably does not present any question of law or, if so, it is one with a very obvious answer. When Congress in the Fair Labor Standards Act referred to "a work week longer than forty hours," it considered, I assume, that what was a work week in fact should be a work week in law. Therefore, the determination of any particular case does not govern any other, for each establishment and industry stands on its own conditions.

A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. *Goodyear Tire & Rubber Co., Inc.* v. *General Dry Batteries, Inc.*, No. 262, October Term 1943, decided February 28, 1944; *District of Columbia* v. *Pace*, No. 117, October Term 1943, decided January 10, 1944; *Baker* v. *Schofield*, 243 U. S. 114, 118; *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367.

In these cases ore mining companies sought declaratory judgments that miners' travel time in the shafts getting to and from actual mining operations, and some other time, is not to be counted in the work week as defined for overtime purposes in the Fair Labor Standards Act. They alleged that the custom of their mines excluded it, but the trial court considered all the evidence and said, "The evidence has disclosed no such custom." The companies also contended that the activity during travel is not in the nature of work. After hearing a mass of conflicting testimony the trial court said of these activities, "They are performed on the premises of the employer, in the furtherance of the employer's business, with no benefits to the employee (except to aid him in the performance of work for the employer), under conditions created and controlled by the employer, and they involve responsibility to the employer and physical exertion, even though not burdensome, on the part of the employee. No characteristic of work is lacking." These were found to be the facts by the two courts below and, whatever

we might decide if we were a trial court hearing the evidence in the first instance, we cannot with our limited review hold them wrong on this record.

If these facts are accepted, the ruling that such travel time is part of the work week seems manifest. I would affirm on these controlling facts.

MR. JUSTICE ROBERTS.

The question for decision in this case should be approached not on the basis of any broad humanitarian prepossessions we may all entertain, not with a desire to construe legislation so as to accomplish what we deem worthy objects, but in the traditional and, if we are to have a government of laws, the essential attitude of ascertaining what Congress has enacted rather than what we wish it had enacted.

Much of what is said in the opinion, in my view, disregards this fundamental function of the judicial process and relies on considerations which have no place in the solution of the issue presented.

What did Congress mean when it said, in Sec. 7 (a) of the Fair Labor Standards Act, that "No employer shall . . . employ any of his employees . . . *for a workweek* longer than forty hours . . . unless such employee receives compensation" for overtime at a specified rate? No other issue is presented.

The materials for decision are those to which resort always has been had in ascertaining the meaning of a statute. They are the mischief to be remedied, the purpose of Congress in the light of the mischief, and the means adopted to promote that purpose. These are not obscure in this instance.

The committee reports upon the bill which became the Fair Labor Standards Act[1] make it clear that the sole pur-

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[1] H. R. 1452, 75th Cong., 1st Sess., H. R. 2182, 75th Cong., 3d Sess., S. R. 884, 75th Cong., 1st Sess.

pose was to increase employment, to require a fair day's pay for a fair day's work by raising the wages of the most poorly paid workers and reducing the hours of those most overworked, and thus correct inequalities in the cost of producing goods and prevent unfair competition in commerce. The reports disclose no other purpose. The Congressional findings and declaration of policy embodied in Sec. 2(a)[2] exhibit no intent to deal with any matter other than substandard conditions in industry stemming from wage and hour practices. The Act will be searched in vain for a mandate respecting any subject other than minimum wages and maximum hours of work. This court has construed it as dealing only with these subjects.[3]

In this setting, therefore, we are to determine what Congress meant by the term "workweek" when it prescribed the maximum number of hours of labor an employer might require to be rendered within any week at the standard wage. The Act does not define "workweek", for the evident reason that Congress believed it had a conventional meaning which all would understand and to which all could conform their practices. The term combines two words in common use. A week is any period of seven days. In accepted usage a man's work means that which he does for his employer as the consideration of the wage he receives. The term is often used in a more general sense as when one is asked what he is doing and replies "I am working for Jones". Of course he does not mean that Jones is paying him for each hour of every week of his life. Men are not commonly paid for the time they sleep, the time they eat, or the time they take to go to, and return from, their employer's premises. Thus, although the phrase "work" may refer to the calling pursued, or the identity of the employer, it is plainly not so used in this statute. Its collocation with the word "week" and with the injunction as to

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[2] 52 Stat. 1060.

[3] *United States* v. *Darby*, 312 U. S. 100, 115, 117, 122, 125.

minimum pay, maximum hours, and overtime for extra work, in any week, shows that what Congress meant by work was what I have above described,—the actual service rendered to the employer for which he pays wages in conformity to custom or agreement.

It is common knowledge that what constitutes work for which payment is to be made varies with customs and practices in different industries or businesses. Where the employe is required to report at his employer's place of business and go thence to the place where his employer's activities are pursued, it has been the custom in some cases to pay for the time spent in going from the employer's place of business to the place of work. In many industries some or all of the employes are required to report and to remain at a given place awaiting a call for emergency or other casual service and, according to understanding, they are paid for the hours during which they wait as well as those in which they actually put forth physical or mental effort. There can be little doubt that Congress expected the provisions of the Act to be fitted into the prevailing practices and understandings as to what constituted work in various industries.

The Act does not provide that the Administrator or the courts are to define a workweek in the case of each employer on such basis as they deem right, regardless of the custom of the industry or of existing agreements between employers and employees. Nor does the Act vest authority in Administrator or court to disregard and supersede existing understandings and practices as to what constitutes work or the workweek. There is nothing in the words of the statute or its history to suggest that Congress intended, without mentioning it, to confer on the Administrator or the courts so vast a power over the industry of the nation.

The question in this case then is: What was the workweek of iron miners when the Act was adopted? If the answer is plain, then, I submit, that existing workweek must control in the administration of the statute unless and

until employer and employés, by consensual arrangement, alter the current practice.

The record presents no dispute as to the facts. Some are matters of public notoriety susceptible of judicial notice; others are contained in offers of evidence which the District Court excluded as irrelevant; others are exposed in the proofs.

Conditions of labor in iron mines and in coal mines are similar. In both, as the workings become deeper, the men have farther to go to reach the places at which they labor. The time thus consumed by individual workmen varies in the same mine, and in different mines. The conditions in the channels of approach to the places of work are somewhat better in iron mines than in coal mines. The custom in coal mines is, therefore, persuasive, since some of the petitioners maintain coal and iron mines in close proximity, and since the practice in the two has been the same for many years.

In the public arbitration proceedings at Birmingham, Alabama, in 1903, the testimony showed that a miner's day was reckoned "from the time [he] gets to the face of the coal until he leaves the face of the coal," and that the eight hour day was so measured. That arbitration resulted in a wage agreement on the "face to face" basis; that is, on a wage fixed according to the time the miners worked at the face of the coal.

In 1917 a public board of arbitration, whose award was approved by the United States Fuel Administrator, found:

"An eight hour day means eight hours work at the usual working places of all classes of employees. This shall be exclusive of the time required in reaching such working places in the workings and departing from the same at night."

In 1920 the report and award of the Bituminous Coal Commission, which was made the basis of agreement between operators and union miners, employed the language just quoted.

In 1933 the Code of Fair Competition for the Bituminous Coal Industry, promulgated by the President under the National Industrial Recovery Act, provided:

"Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or tonnage or other piece work basis."

In 1933 the Appalachian Agreement, approved by the President, provided:

"Eight hours of labor shall constitute a day's work. The eight hour day means eight hours' work in the mines at the usual working places for all classes of labor exclusive of the lunch period."

Prior to 1938, the petitioner Tennessee Coal, Iron & Railroad Company paid its miners either on a piece work basis or upon a shift basis, as did the petitioners Sloss-Sheffield, and Republic Steel. But the common understanding of men and management was that, at first, ten hours and, later, eight hours constituted a working day. This is shown by the proofs and there is no evidence to the contrary.

On numerous occasions the men working in these mines claimed, through their unions, that they ought to be paid for travel time consumed in the mines in going to or from the face where they worked. Their demands for pay for travel time are eloquent proof that they understood the basis on which their pay was reckoned and that it did not include travel time as working time. No agreement to pay for travel time was made and no practice to pay for it was adopted.

In 1934 Tennessee made an agreement with the Union representing its employes, which was renewed in 1935, and again in 1936. It is undisputed that all of these agreements excluded payment for travel time. On October 6, 1938, before the Fair Labor Standards Act was in effect, a collective

bargaining agreement was made between the International Union, affiliated with the CIO, and the Tennessee Company. In this agreement it was provided:

"Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.

"The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

This agreement remained in effect until May 5, 1941, when the provisions in question were abrogated pursuant to an opinion promulgated by the Wage and Hour Administrator as hereinafter described.

The circumstances are not materially different with respect to Sloss-Sheffield. That company has bargained with a union representing its miners since 1934. Several times the union made a demand for payment of travel time but this was not granted. A formal agreement containing the same definitions of workweek, and hours of work, as in the case of Tennessee, was executed in 1939 and renewed in 1940. The company continued to pay on the face to face basis until 1941.

Republic Steel has had no formal written agreement with its employes, but it has bargained with their union. As early as 1933 the union suggested that an arrangement be made whereby the men enter the mine on their own time and come out on company time, but the matter was not pressed. It came up again in 1934. After a strike, negotiations resulted in a return of the men to work on the face to face plan of payment. In 1935 the union proposed that the employes should enter on their own time and come out on company time, but in negotiations the matter was dropped. In 1936 the union wrote the company respecting

an agreement and, in its proposal, said: "The eight hour day means eight hours in or about the mines at the usual working places for all classes of work." In 1939 the union proposed an agreement containing a like provision. In that year the union preferred charges before the National Labor Relations Board but these did not involve the face to face basis of wage computation. The complaint was settled by stipulation. The company continued to pay for a day's work on the face to face basis until May 1, 1941.

The Fair Labor Standards Act became effective October 24, 1938. At that time coal and iron miners were being paid on the basis of their time spent at their working places in the mine. The miners fully understood this basis.

On July 9, 1940, the director of the legal department of the United Mine Workers of America, in a letter to the Administrator of the Act, requested that he accept the definition of working time contained in the Appalachian agreement, which the letter said embodied "the custom and traditions of the bituminous mining industry." That definition was the same as that quoted from the Tennessee agreement, *supra*. The letter further said, respecting the face to face method:

"This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense."

and further said:

"As mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places."

and added that adjustment of wage rates to any new measurement

"would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States."

On the footing of that letter the Administrator issued a release stating that the face to face basis in the bituminous industry would not be unreasonable.

On March 23, 1941, the Administrator announced a modified portal to portal wage hour opinion in which he defined the work day in underground metal mining as starting when the miner reports at the collar of the mine, ends when he returns to the collar, and includes the time spent on the surface in obtaining and returning lamps, carbide, and tools and in checking in and out. Realizing that this was a complete change of opinion, the Administrator announced that he would not seek to compel payment of restitution from mine owners operating on a face to face basis but that he could not interfere with the right of employes or their representatives to sue for past overtime and penalties under § 16(b) of the Act. Thereupon the unions representing miners demanded payment of overtime for all travel time since the effective date of the Act, and invoked the penalties specified therein.

In order to avoid possible penalties, the petitioners complied with the Administrator's ruling and brought the present suit for a declaratory judgment to the effect that working time of underground employes comprised the hours of work in the usual working places in the mine and did not include the time consumed in travel thereto and therefrom.

At the trial much evidence was taken as to the practice existing in iron mines long prior to, and at the date of the adoption of, the Fair Labor Standards Act. This was given by miners, foremen, and employers, and represented not any single locality but the industry over the country. In fact, some of the testimony consisted of depositions taken by the respondents, but offered by the petitioners. It was all

to the effect that the working time of iron miners had always been calculated and paid for according to the time worked in the mine at the place assigned for the work and that travel time had never been included in the time for which payment was made.

The district judge entered twenty-nine findings of fact. The first four are formal. The fifth is to the effect that, in the history of mining in the Birmingham District, plaintiffs' employes have been paid without regard to the number of hours spent at the face of the ore or at any specified place or station in the mines, and adds: "This compensation has never been based upon any precise number of hours spent daily at the face of the seam or at any specified place or station in the mines." The finding would seem difficult to explain in view of the history heretofore outlined. The explanation is found in the fact that, although the men were paid for an eight hour day of work at the face, if blasts were about to be set off at the close of the day the men were sent away from the face some time before the blasting but were, nevertheless, paid as if they had remained at the face for the full eight hours. But this can be no reason for disregarding the practices and agreements of the parties.

Findings 6 to 12, inclusive, refer to various methods of payment practiced in the past and to the character of the work of miners and other underground workers. They evidently are intended to show that, while an eight hour day was in force, the wage was not calculated at an hourly rate. Of course, they do not contradict the fact that forty hours constituted the workweek nor the fact that it was understood that no wages were paid for time spent in travel in the mines.

Finding 13 is to the effect that the unions which made agreements with various petitioners had never been certified by the National Labor Relations Board as appropriate units for collective bargaining. The bearing of this finding is difficult to understand in view of the fact that the employers dealt with the unions representing their men and

two operated under formal collective bargaining agreements with nationally affiliated unions.

Finding 14 briefly mentions that the men had several times demanded pay for travel time.

Findings 15 to 27, inclusive, describe the conditions under which the men arrive at the mine, check in, obtain their tools, and walk, or are carried, to their work underground and how they return. They recite that the men have to obey company regulations while they are on the company property and in going to and returning from work. Many of these regulations are for the men's safety. These findings also show that, after arriving on company property, the men receive certain directions with respect to the work they are to do. The obvious bearing of these findings is that the court thought travel ought to be considered work within the intendment of the Act, whatever the custom, practice, or agreement of the parties. It would be no less a judicial fiat, though somewhat more extreme, to hold that as the men's living quarters are uncomfortable and unhealthy and they must live in the neighborhood of the mines, the time spent in their homes must be paid for as work.

The two concluding findings are of facts which add nothing. They are to the effect that, if all the travel time is counted in the workweek, the men have worked more than forty hours per week and the petitioners have not paid them for more than forty hours.

The opinion and concurring opinion in this court rely heavily on these findings, especially as they were accepted by the Circuit Court of Appeals. But it will be observed that the findings are noteworthy for the feature that they deal, except in the instance mentioned, which has already been explained, with facts which are immaterial to the issues in the case. I do not see how aid to decision can be derived by refusing to disturb findings which do not meet the issue made by the pleadings. It is significant that the District Court avoided any finding as to whether the em-

ployers had ever paid travel time or as to the understanding of the parties that the employers were not paying for such travel time. And it is even more significant that the court made no finding whatever about the formal collective bargaining agreements entered into by the respondents with the petitioners in which both parties clearly signified their understanding of what was work in iron mines. And the court could not, under the proofs in this case, have found that these collective bargaining agreements were contrary to the accepted practice in iron and coal mines throughout the country prior to 1941. The petitioners objected that the findings omitted any reference to the fact that the companies had never paid for travel time, to the fact that the day's work for which wages were paid did not include travel time to or from the place where they mined the ore, or to the negotiations and agreements as to working time, and sought a new trial. The objections and motions were overruled.

Reliance is placed on the trial court's finding that the evidence discloses no custom to exclude travel time from the workweek. But that very reliance exposes the fallacy of the lower court's and this court's position. Unless the statute gave the courts authority to make contracts for the parties, which the statute did not make, a court could not support such a contract by finding that there was no custom with respect to travel time. It would be necessary for it to find that there was a custom to pay for such time, which the District Court failed to do, for the obvious reason that there was no evidence of such custom.

To say that we should pitch decision on acceptance of the findings of the trial court, when that court neglected to find facts which were highly relevant and material, is to disregard the real and the only issue in the case.

As I have already pointed out, the Fair Labor Standards Act was not intended by Congress to turn into work that which was not work or not so understood to be, at the time of its passage. It was not intended to permit courts to

designate as work some activity of an employee, which neither employer nor employee had ever regarded as work, merely because the court thought that such activity imposed such hardship on him or involved conditions so deleterious to his health or welfare that he ought to be compensated for them.

It is common knowledge that the issue of portal to portal pay was first nationally raised in connection with the mining industry after the nation was at war and in connection with disastrous coal strikes. And, indeed, the inspiration for the demand for portal to portal pay was furnished by the decision of the court below in this case. That decision was rendered on March 16, 1943. Three days later the National Policy Committee of the United Mine Workers changed its demanded definition of hours of labor so that existing demands, which, until then, had been on the traditional face to face basis of payment, should "conform with the basic legal requirements of the industry and the maximum hours of work time provisions be amended to establish 'portal to portal' for starting and quitting time for all underground workers." In presenting this demand it said: "The Mine Workers desire to take advantage of the law which, under the Alabama decision, grants them the right to be paid for the time they are in the mines." Thus it is plain that the decision under review was understood, as it must be, as a declaration of law by a court as to what is a workweek under the Act and not a finding of fact based on the custom of the industry and the agreement of the parties. In August class actions were filed by the United Mine Workers in various district courts to obtain overtime compensation for portal to portal pay.

One further fact should be noted. The District Court found that not only the travel time from and to the mouth of the mine should be counted as working time, but that the time men spent on the surface in collecting tools, etc. should also be included. The Circuit Court of Appeals, although professing to accept the fact findings of the Dis-

trict Court, reversed its judgment with respect to time spent on the surface, saying no more than that the District Court was wrong in including that time. This is further proof that the decision of the case by both courts below turns on the view of a court as to what ought to be considered work and what not, irrespective of the understanding of the parties. Suppose that the parties had agreed that travel time was working time and to be included and paid for in the workweek? Would the courts be at liberty to find the contrary and deprive respondents of the benefit of the agreement. I think not.

I cannot better characterize the result in this case than by quoting from what Judge Sibley said in his dissenting opinion below.[4]

"If it would be better to include travel time in work time, it ought to be done by a new bargain in which rates of pay are also reviewed. If the change is to be by a special statute (some western States have such statutes), it will operate justly in futuro, and not by unexpected penalty, as here.

"There is nothing in the Act to outlaw agreements that travel time in getting to or from the agreed place of work is not work time. This is true though the employer may organize a means of transportation and make rules for its use. The agreements here that work time includes only time at the face of the ore bed are not illegal. Digging out the ore is what the miners agree to do, and for that they are paid. Getting their tools together and riding or walking to the agreed place of work is not, by force of any law, work done for the mine owner. No one, I suppose, would say that if a group of miners who had spent an hour riding to work decided of their own will not to dig any ore and spent another hour riding back, they had done any work for which they should be paid by force of the Act.

. . . . . .

[4] 135 F. 2d 324, 325.

"It is now proposed to assess against these appellants as back pay for overtime an estimated quarter of a million dollars, to be doubled by way of penalty, to compensate the miners for their time in going to and from their place of work, in the face of their agreements that this time was not in their work time. They are to get three times as much per hour for riding and walking to and from the work they were hired to do, as they get for doing the work itself. The injustice of it to me is shocking."

I would reverse the judgment.

The CHIEF JUSTICE joins in this opinion.